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No. 95-_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

MICHAEL BOWERSOX,
Superintendent of the Potosi Correctional Center,

Petitioner,

vs.

CALVERT L. ANTWINE,
A State Prisoner Under Capital Sentence,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

Questions Presented For Review

I.

Whether a federal appellate court reviewing a state-court conviction may overturn state-court fact-findings and credibility determinations without finding an exception to the statutory presumption of correctness under 28 U.S.C. § 2254(d).

II.

Whether a prosecutor's penalty-phase closing argument that the defendant would be put to death "instantaneously," which did not affirmatively mislead the jury as to its role in the capital sentencing process, violated the Eighth Amendment.

III.

Whether a prosecutor's penalty-phase closing argument that the defendant would be put to death "instantaneously" and an argument that the cost to taxpayers of an execution was less than the cost of life imprisonment violated the Fourteenth Amendment.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Opinions Below

The panel opinion of the United States Court of Appeals for the Eighth Circuit granting the writ of habeas corpus is reported at 54 F.3d 1357 (8th Cir. 1995), and is published in the Appendix at A-1. The order of the district court denying the petition for writ of habeas corpus is not reported, but is included in the Appendix (A-32).

Jurisdictional Statement

The United States Court of Appeals for the Eighth Circuit issued its opinion on May 12, 1995 (A-1). The petition for rehearing or rehearing *en banc* was denied by the court of appeals on July 25, 1995 (A-19). Pursuant to 28 U.S.C. § 2201(c) and Supreme Court Rules 13.01 and 13.4, the present petition for writ of certiorari was required to be filed by petitioner within ninety days. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty or property without due process of law . . . .

Statement of the Case

Ten years ago, respondent, Calvert L. Antwine, was found guilty by a jury of first-degree robbery, second-degree murder, and capital murder in the Circuit Court of Jackson County, Missouri. The jury recommended that he be sentenced to a thirty-year term of imprisonment for robbery, life imprisonment for second-degree murder, and death for capital murder. Respondent was sentenced accordingly.

The circumstances of respondent's offenses were summarized by the Missouri Supreme Court on direct appeal.

> At approximately 6:00 p.m. on November 11, 1983, appellant arrived at 2108 Vine Street where several men were refurbishing a restaurant for the owner, Eric George Jones ("George"). Appellant, who was known by the workers, asked where George Jones or his brother, Winston, could be found. When the workers, who were involved in a crap game, appeared to ignore appellant, appellant decided to "bust up" the crap game. He produced a handgun and announced, "This is a stick up." After firing several shots into the wall and hitting a space heater, appellant took money from the workers and left the restaurant.
>
> From the restaurant, appellant immediately proceeded to the Lincoln Garden Apartments, located a block away from the restaurant. There he encountered Joy Jones, the sister of George and Winston Jones, who was leaving the apartment she shared with Winston. Joy was several yards from the

doorway to her apartment when she saw appellant approaching. When she asked him what he wanted, appellant indicated that he was looking for George and Winston. When Joy asked what he wanted with her brothers, appellant said he was going to kill them. Appellant proceeded to the doorway where he demanded that Winston open the door. Winston cracked open the door, whereupon appellant forced his way in. As the apartment door closed, Joy ran to the restaurant to look for George.

Shirley Ford and her daughter, LaTanya, lived in an adjacent apartment. They observed appellant forcing his way into Joy's apartment, saw that he was carrying a gun, and heard appellant yell, "I'm going to kill all of you mother _____." After appellant entered the apartment, Shirley and LaTanya heard shots. Shirley called the police. She observed appellant leaving the apartment carrying a gun and a black bag. Appellant entered a gold and black car and drove away.

Police officers later found Winston Jones lying face down on the living room floor of the apartment with three gunshot wounds to his head. At trial, the medical examiner testified that two of the wounds were caused by a weapon fired while flush against the skin. Other items found in the apartment included a large quantity of marijuana and twelve hundred dollars in cash.

After leaving Joy's apartment, appellant proceeded to a house at 26th and College from which the Jones brothers operated a drug business. While appellant was there, George Jones arrived with Joy and two others. George knocked on the door where he was met by appellant with a gun in his hand. George turned and fled. Appellant gave chase and caught him. Joy heard appellant say, "I just killed your brother and I'm going to kill you too." Appellant directed George at gun point back to the car and forced George to drive.

Sometime between 6:00 and 7:00 p.m., two police officers were separately dispatched to the intersection of 34th and Prospect on a disturbance call. Upon arrival, the officers observed appellant and George struggling in the middle of the street over the possession of a handgun. The officers approached, secured the gun and broke the two men apart. Both appellant and George were placed under arrest, handcuffed behind the back and put into a paddy wagon for transport to the police station. While in the paddy wagon, appellant stepped through his arms so that his hands were in front of his body.

Upon arrival at the station, Officer Schilling, the paddy wagon driver, placed George and appellant in a holding cell. Approximately five to ten minutes later, Officer Schilling heard a scream coming from the holding cell and ran back to investigate. He and another officer, Detective Lonkansky,

> entered the cell and found George lying face down on the floor, semiconscious and bleeding from the nose and mouth. Appellant was seated on a bench three to four feet away.
>
> Officer Schilling left the cell to call an ambulance. Realizing that he was wearing his service revolver, Detective Lonkansky call for assistance and stepped out of the cell. He had walked approximately four feet when he heard a loud thumping sound. Turning, he saw appellant in midair, coming down with both feet on the side of George's head. Detective Lonkansky again shouted for assistance. Appellant sat back down on the cell bench, picked up a rag off the floor and calmly proceeded to wipe blood off his shoes. The medical examiner testified that George Jones died as the result of a blunt force injury to the head, and that such injury was consistent with being kicked, stomped or beaten against a concrete floor.
>
> Appellant contended that he killed the Jones brothers in self-defense. More specifically, appellant urged the jury to believe that he wanted out of the drug business, in which he was engaged with the Joneses, and that the Joneses threatened to kill him if carried out his intention to quit.

State v. Antwine, 743 S.W.2d 51, 55-56 (Mo. banc 1987), cert. denied, 486 U.S. 1017 (1988) (footnote omitted) (A-52 to A-55). The Missouri Supreme Court affirmed respondent's convictions and sentences (A-52). Id.

Following his direct appeal, respondent, sought post-conviction relief in the Circuit Court of Jackson County pursuant to Missouri Supreme Court Rule 29.15. Following an evidentiary hearing, the circuit court denied relief. Respondent appealed. On appeal, the Missouri Supreme Court affirmed the circuit court's denial of post-conviction relief (A-96). Antwine v. State, 791 S.W.2d 403 (Mo. banc 1990), cert. denied, 498 U.S. 1055 (1991).

Respondent filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 on January 28, 1991, in the United States District Court for the Western District of Missouri. After litigation before the district court, District Judge Dean Whipple denied the petition for writ of habeas corpus (A-32).

Respondent appealed the denial of the writ to the United States Court of Appeals for the Eight Circuit. After briefing and oral argument, the Court issued its opinion vacating respondent's death sentence and remanded the cause to the District Court with directions that the writ of habeas corpus issue (A-1). Petitioner filed a petition for rehearing and rehearing *en banc*. On July 25, 1995, the panel denied the petition for rehearing (A-119). The suggestions for rehearing *en banc* were also denied; however, one judge of the appellate court, the Honorable C. Arlen Beam, voted to grant the petition for rehearing *en banc* (A-119).

Argument

I. WHETHER A FEDERAL APPELLATE COURT REVIEWING A STATE-COURT CONVICTION MAY OVERTURN STATE-COURT FACT-FINDINGS AND CREDIBILITY DETERMINATIONS WITHOUT FINDING AN EXCEPTION TO THE STATUTORY PRESUMPTION OF CORRECTNESS UNDER 28 U.S.C. § 2254(d).

In 1966 Congress enacted subsection (d) of 28 U.S.C. § 2254 to mandate that federal habeas courts apply a presumption of correctness to state-court findings of fact. This statute requires that federal courts show a high measure of deference state-court fact-findings. Sumner v. Mata (Sumner II), 455 U.S. 591, 597-98 (1982). The purpose of this provision was to alleviate friction between state and federal courts that is inherent in habeas review. Sumner v. Mata, (Sumner I) 449 U.S. 539, 550 (1981). Under the statute, state-court factual findings "shall be presumed to be correct" unless one of eight statutory exceptions exist. 28 U.S.C. § 2254(d); Sumner I, 449 U.S. at 550.

In this case, the Eighth Circuit Court of Appeals expressly declined to apply the statutory presumption of correctness to the state court's factual findings and reviewed the factual issues *de novo*. More significantly, the court of appeals reviewed the trial court's credibility determination *de novo* with no deference to the trial court's superior ability to assess the demeanor of the witness. This case presents a significant issue in that the court of appeals' opinion gives federal courts in this circuit license to disregard the congressional mandate that a presumption of correctness be applied to state-court factual determinations.

Respondent alleged during his state-court post-conviction litigation that he received ineffective assistance of . .

trial counsel because his attorney failed to present a mental disease defense and failed to present mental health mitigating evidence during the penalty-phase of his trial. An evidentiary hearing was held before the motion court. Respondent presented the testimony of Dr. William O'Connor (A- 168 to A-271). Following the evidentiary hearing, the motion court entered detailed findings of fact and conclusions of law (A-116 to A-118).

In summary, the motion court found Dr. O'Connor not to be a credible witness and the court rejected Dr. O'Connor's conclusion that respondent was suffering from a bi-polar disorder at the time of the offense (A-116 to A-118).[1] The motion court discredited Dr. O'Connor's testimony, in part, because his evaluation of respondent occurred five years after the offense, because he failed to interview respondent's friends and family to establish whether respondent had a history of bi-polar behavior, because he could not say with any certainty that respondent was suffering from a bi-polar disorder at the time of the offense, because there was no evidence that the pre-trial examination which concluded that respondent was not suffering from a mental disease was substandard, because respondent's offense behavior was inconsistent with a bi-polar disorder, and because Dr. O'Connor failed to conduct a blood test that would have objectively determined whether respondent suffered from a bi-polar disorder (A-116 to A-118). The motion court credited the pre-trial report of Dr.

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[1] Dr. O'Connor is a professional defense witness who is familiar to the Missouri Courts. This case is one of many in which a finder of fact has rejected Dr. O'Connor's conclusion that the defendant suffered from a mental disease or defect. E.g., State v. Harris, 870 S.W.2d 798, 819 (Mo. banc), cert. denied, __ U.S. __, 115 S.Ct. 371, 130 L.Ed.2d 323 (1994); Sidebottom v. State, 781 S.W.2d 791, 795, 797 (Mo. banc 1989), cert. denied, 497 U.S. 1046 (1990); State v. Mease, 842 S.W.2d 98, 114 (Mo. banc 1992), cert. denied, __ U.S. __, 113 S.Ct. 2363, 124 L.Ed.2d 269 (1993); Guinan v. Delo, 5 F.3d 313, 318 (8th Cir. 1993).

Robijn Hornstra which concluded that respondent was not suffering from a mental disease or defect and that his behavior was consistent with PCP intoxication (A-117 to A-118). The motion court ruled that respondent received effective assistance of counsel (A-118). The Missouri Supreme Court held that the motion court's factual findings were not "clearly erroneous" (A-111). Antwine v. State, 791 S.W.2d 403, 411-12 (Mo. banc 1990), cert. denied, 111 S.Ct. 769 (1991).

A claim of ineffective assistance of counsel presents a mixed question of law and fact. Strickland v. Washington, 466 U.S. 668, 698 (1984). While the ultimate conclusion as to whether counsel was effective is a question of law subject to *de novo* review, state court findings of fact made while resolving an ineffectiveness claim are entitled to the statutory presumption of correctness. Id. The standard to be applied by reviewing courts to state-court fact findings was succinctly articulated by this Court in Sumner I:

> [T]he findings made by the state-court system "shall be presumed to be correct" unless one of seven conditions specifically set forth in § 2254(d) was found to exist by the federal habeas court. If none of those seven conditions were found to exist, or unless the *habeas* court concludes that the relevant state-court determination is not "fairly supported by the record," "the burden shall rest upon the applicant to establish *by convincing evidence* that the factual determination by the State court was erroneous." (Emphasis supplied).

Sumner I, 449 U.S. at 550. In adopting this standard, the Court recognized that it was Congress' intent that a state-court fact-finding not be overturned merely by a . .

"preponderance of the evidence." Id. at 551. To ensure that Congress' intent was carried out, this Court mandated that when a federal court overturns a state-court fact-finding, the court should include in its opinion an explanation of which statutory exception it applied and why. Id. at 551-52.

The most commonly recognized exception to the presumption of correctness is a finding that the state-court factual determination is not fairly supported by the record. 28 U.S.C. § 2254(d)(8). In considering whether a state-court finding is "fairly supported by the record," it is not enough for the reviewing court to disagree with the trial court's findings; rather, the court must conclude that the state court's finding "lacked even 'fair support' in the record." Marshall v. Lonberger, 459 U.S. 422, 432 (1983); Wainwright v. Witt, 469 U.S. 412, 434 (1985). Moreover, this standard of review is no broader than that applicable to review of lower federal courts' determinations. Marshall v. Lonberger, 459 U.S. at 434-35; F.R.C.P. 52(a) (findings of fact made by a lower federal court shall not be set aside unless "clearly erroneous"). Finally, if there is an ambiguity in the record, the trial court is entitled to resolve that ambiguity in favor of the state. Wainwright v. Witt, 469 U.S. at 435.

In reviewing respondent's claim of ineffective assistance of counsel, the court of appeals adopted the following standard of review, which is inconsistent with 28 U.S.C. § 2254(d), to be applied to state-court findings of fact:

> The Rule 29.15 motion court, however, found "no credible evidence to support the defendant's claim that he suffered from a mental disease or defect," Antwine v. Delo, No. CV88-14232, slip op. at 10-11 (Mo. Cir. Ct., Sept. 5, 1989) [A-116 to A-118], and the State argues that this state-court finding is

> entitled to a presumption of correctness under 28 U.S.C. § 2254. We disagree. The issue is whether the failure to discover and present evidence of Antwine's mental condition undermines our confidence in the outcome of either the guilt or sentencing phase of the trial. We are concerned, then, with whether the jury--not the motion court--would have found the evidence of Antwine's mental condition credible.

Antwine v. Delo, 54 F.3d 1357, 1365 (8th Cir. 1995) (A-16). The court of appeals conducted a *de novo* review of the motion court's underlying factual findings outlined above (A-16 to A-19). Id. at 1366. The court of appeals presumed that Dr. O'Connor's testimony was true despite the motion court's contrary conclusion (A-16 to A-19). Id. Apparently, the court of appeals believed that the motion court was obligated to credit both the factual statements and the ultimate conclusions of Dr. O'Connor simply because the State did not present contrary evidence. The court of appeals, however, may not substitute its own judgment as to the credibility of Dr. O'Connor for that of the state court. This is a prerogative that 28 U.S.C. § 2254 does not allow. Maggio v. Fulford, 462 U.S. 111, 113 (1983).

> Title 28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them. In United States v. Oregon Medical Society, 343 U.S. 326, 72 S.Ct. 690, 96 L.Ed. 978 (1952), commenting on the deference which this Court gave to the findings of a District Court on direct appeal from a judgment in a bench trial, we stated:

> "As was aptly stated by the New Your Court of Appeals, although in a case of a rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal." Boyd v. Boyd, 252 N.Y. 422, 429, 169 N.E. 632, 634." *Id.*, at 339, 72 S.Ct. at 698.

Marshall v. Lonberger, 459 U.S. at 434. In this case "the three judges of the Court of Appeals appear to have differed from the [Missouri] trial judge, the seven justices of the Supreme Court of [Missouri], and the federal district judge, only with respect to evaluation of the evidence before the trial court." Maggio v. Fulford, 462 U.S. at 116. This, however, is an improper basis upon which to grant a writ of habeas corpus. Id.

The motion court's factual findings are fairly supported by the record and are dispositive of respondent's claim of ineffective assistance of counsel. The court of appeals may disagree with the motion court's fact findings "[b]ut the statute [requires] the federal courts to face up to any disagreement as to the facts and defer to the state court unless one of the factor's listed in § 2254(d) is found." Sumner II, 455 U.S. at 597-98. The court of appeals failed to follow this mandate.

II. WHETHER A PROSECUTOR'S PENALTY-PHASE CLOSING ARGUMENT THAT DEFENDANT WOULD BE PUT TO DEATH "INSTANTANEOUSLY," WHICH DID NOT AFFIRMATIVELY MISLEAD THE JURY AS TO ITS ROLE IN THE CAPITAL SENTENCING PROCESS, VIOLATED THE EIGHTH AMENDMENT.

This point presents a significant issue which provides the Court with an opportunity to clarify the extent to which its Eighth Amendment jurisprudence applies to penalty-phase claims of prosecutorial misconduct. By resolving the question of whether a penalty-phase closing argument that respondent would be put to death "instantaneously" undermined the jury's sense of responsibility for the sentencing decision, the Court will be able to further define the distinction between those arguments which call for additional scrutiny under the Eighth Amendment and those that are properly reviewed under the narrow due process standard of Donnelly v. DeChristoforo, 416 U.S. 637 (1974). See Sawyer v. Smith, 497 U.S. 227, 244 (1990) (Caldwell must be read as providing additional protection against error, beyond that afforded by Donnelly, in the capital sentencing context.).

In Caldwell v. Mississippi, the Court considered whether a capital sentence was invalidated when the jury was led to believe that the responsibility for determining the appropriateness of the death sentence rested with the appellate court. 472 U.S. 320, 323 (1985). Caldwell's jury was told by the prosecutor that its sentencing decision was not final and that it would be reviewed by the Mississippi Supreme Court. Id. at 325-327. The Court found that this argument was inconsistent with the Eighth Amendment's heightened "'need for reliability in the determination that death is the appropriate punishment in a specific case.'" Id. at 340 (quoting Woodson v. North Carolina, 428 U.S. 280,

305 (1976)). Thus, the Court held that it was unconstitutional to rest a death sentence on a determination made by a jury which was led to believe that the responsibility for determining the appropriateness of the defendant's death rested elsewhere. Id. at 328-29 (plurality opinion); id. at 343 (O'Connor, J. concurring).

Since Caldwell, the Court has discussed the distinction between claims warranting review under the Eighth Amendment and those calling for review under the Due Process Clause. The Court has consistently limited the application of Caldwell and the Eighth Amendment to instances in which the jury was mislead as to its role in the sentencing process.

In Darden v. Wainwright, 477 U.S. 168 (1986), the Court addressed the question of whether several improper comments made during the prosecutor's closing argument undermined the Eighth Amendment requirement of reliability in sentencing. In concluding that the comments did not offend the Eighth Amendment, the Court observed that Caldwell is relevant only to comments that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision. Id. at 183 n. 15. In Dugger v. Adams, the Court observed that "a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law" before he can establish a Caldwell violation. 489 U.S. 401, 407 (1989).

Most recently, the Court considered whether evidence that a capital defendant already had been sentenced to death in another case impermissibly undermined the sentencing jury's sense of responsibility for determining the appropriateness of the defendant's death. Romano v. Oklahoma, ___ U.S. ___, 114 S.Ct. 2004, 129 L.Ed.2d 1

(1994). In holding that it did not, the Court again emphasized that because the prosecutor did not misstate the jury's role in the sentencing process, the infirmity identified in Caldwell was absent from the case. Id. 114 S.Ct. at 2010.

> Here, the jury was not affirmatively misled regarding its role in the sentencing process. The evidence at issue was neither false at the time it was admitted, nor did it even pertain to the jury's role in the sentencing process.

Id. Thus, Caldwell and its progeny stand for the proposition that the Eighth Amendment is violated during the penalty-phase of a capital trial only when the prosecutor's closing argument undermines the jury's sense of responsibility for deciding the appropriateness of a sentence of death by presenting inaccurate information regarding the jury's role in the sentencing process.

In the instant case, the court of appeals, held that a portion of the prosecutor's following penalty-phase closing argument violated the Eighth Amendment (A-5 to A-8). Antwine v. Delo, 54 F.3d 1357, 1361-62 (8th Cir. 1985).

> I want to make sure you understand exactly what the people of the State of Missouri are asking you to do. Let there be no question, we are asking you to put this defendant to death. We are asking you to do so by returning a verdict of capital punishment. When that occurs, he will be taken into a room. There will be witnesses that will come down. There will be a priest present. He will be asked if he has any last requests or has any last requests. He will be put in a chair. A pellet will be dropped into

> acid, and when he inhales that, he would be put to death instantaneously.
>
> This is what the people you have elected to represent you have decided is the law in the State of Missouri, and it is the proper and just punishment if, after the evidence and the facts your viewing of the aggravating circumstances which will be given to you in the instructions, you decide and be the judge of his punishment in this case.
>
> Certainly it is a far more humane execution than this man provided Eric [George] Jones. If you're up and deliberating on this matter, and no one is going to take it lightly, and it shouldn't be taken lightly, and I would suggest that all you search your own soles before discussing it . . . (A-148 to A-149).

Specifically, the Court of Appeals found that the prosecutor's description of execution by lethal gas as "instantaneous" offended Eighth Amendment concerns regarding the arbitrary imposition of the death penalty because it was inaccurate and because it undermined the jury's sense of responsibility for imposing a sentence of death by easing the jury's conscience with the knowledge of a quick and easy death (Id.).[2] Id. The Court of Appeals did not conclude that the comments misdescribed the jury's role in the sentencing process. Rather, the Court of Appeals concluded that death by lethal gas does not occur instantaneously, and therefore, the

---

[2] The court did not consider whether its application of Caldwell violated Teague v. Lane, 489 U.S. 288 (1989).

prosecutor's comments were inaccurate (Id.).[3] Id. The prosecutor's argument, however, may only be characterized as inaccurate when taken out of context.

In an absolute or abstract sense death by lethal gas may not occur "instantaneously." Here, however, the prosecutor used the term in a relative sense--a sense relative to the victim's death. Compared to George Jones' death, death by lethal gas could be reasonably characterized as instantaneous.

George Jones was beaten to death in a holding cell (A-54). State v. Antwine, 743 S.W.2d 51, 55-56 (Mo. banc 1987), cert. denied, 486 U.S. 1017 (1988). Jones was placed in the cell with his hands cuffed behind his back (A-89). Id. at 72. He had neither the means to defend himself nor the means to escape the attack. Respondent repeatedly slammed Jones' head against the cell wall, the cell bars, and the cell floor, beating him into a semi-conscious state (A-89). Id. Responded then stomped on Jones' head repeatedly as Jones' lay on the concrete floor (A-54, A-89). Id. at 55-56, 72. Although he suffered massive head injuries, Jones survived in the hospital for six days before dying. The prosecutor's description of death by lethal gas as "instantaneous" is accurate when compared to the lingering death George Jones suffered.

---

[3] The Court of Appeals based this conclusion upon three newspaper accounts of California's 1993 execution of Robert Alton Harris. The newspapers accounts gave varying reports that Harris lost consciousness between one and one-half and seven minutes after he breathed the lethal gas (A-6). Antwine v. Delo, 54 F.3d at 1361-62. The Court of Appeals concluded, based on these conflicting newspaper accounts, that the prosecutor's description of an "instantaneous" death was inaccurate (Id.). Id. Of course, the Harris execution, which occurred in another state eight years after the prosecutor's comments, standing alone sheds very little light on 1983 execution practices in Missouri.

Not only did the court of appeals find that the prosecutor's statement was inaccurate, but the court found that the statement diminished the jury's sense of responsibility for its sentencing decision (A-7). Antwine v. Delo, 54 F.3d at 1362. The Court of Appeals reasoned as follows:

> So where is the harm in this vision of a quick and easy death? The danger is that the jurors, faced with a very difficult and uncomfortable choice, will minimize the burden of sentencing someone to death by comforting themselves with the thought that the death would at least be instantaneous, and therefore painless and easy. The prosecutor's argument diminished the jurors' sense of responsibility for imposing the death penalty.

Id. (A-7). This reasoning suffers from the same infirmity as the reasoning rejected by this Court in Romano v. Oklahoma, supra.

In Romano, the petitioner argued that the jury sense of responsibility for its sentencing decision was undermined by the knowledge that the petitioner had a prior sentence of death. Romano v. Oklahoma, 114 S.Ct. at 2008-09. The petitioner reasoned that the jury felt that their decision was less important because his death had already been decided by another jury. The Court rejected this argument after noting that it was impossible to know how the evidence affected the jury. Id. at 2012. It seemed equally plausible to the Court that the evidence could have made the jurors more inclined to impose a death sentence, or it could have made them less inclined to do so, depending upon one's intuition. Id. at 2012-13.

Likewise, it cannot be known what effect the knowledge that petitioner's death would be "instantaneous" had on the jury in this case. Speculation about the effect this comment had on the jury is an insufficient basis upon which to find that the jury's "sense of responsibility" was undermined. Id.

Even if the Court were to assume that the prosecutor's statement was inaccurate and/or that the comment made it easier for the jury to impose the death penalty, the prosecutor's comments did not violate the Eighth Amendment because they did not diminished the jury's view of its role in the sentencing process.

To undermine the jury's sense of responsibility within the meaning of the Eighth Amendment, the jury must be misled as to their role in the sentencing process. None of the comments in this case had the effect of misleading the jury to think that it had a reduced role in the sentencing process or that it was not the decision-making body responsible for deciding whether respondent should be sentenced to death. To the contrary, the prosecutor made it clear to the jury that it was responsible for determining whether respondent should be sentenced to die when he said: "Let there be no question, we are asking you to put this defendant to death" (A-148). Likewise, the jury instructions made it clear that it was the jury's duty to determine the appropriate sentence (A-160 to A-167). The jury fully understood that the responsibility for determining the appropriate sentence in this case rested with it. The jury was not misled regarding its role in the sentencing process.

The Court of Appeals opinion in this case ignores the limited scope of review available under the Eighth Amendment for penalty-phase claims of prosecutorial misconduct. Eighth Amendment review is limited to claims

in which the prosecutor presents (1) erroneous information which (2) misdescribes the jury's role in the sentencing process (3) such that the jury's sense of responsibility for the sentencing decision is diminished. The Court of Appeals holding which applies Caldwell to prosecutorial arguments that do not misdescribe the jury's role in sentencing is in conflict with decisions of this Court and the Courts of other circuits. Caldwell v. Mississippi, supra; Darden v. Wainwright, supra; Dugger v. Adams, supra; Romano v. Oklahoma, supra; see also Tucker v. Kemp, 802 F.2d 1293, 1296 (11th Cir. 1986) (en banc); Parks v. Brown, 860 F.2d 1545, 1549-50 (10th Cir. 1988) (en banc), reversed on other grounds sub nom., Saffle v. Parks, 494 U.S. 484 (1990); Zettlemoyer v. Fulcomer, 923 F.2d 284, 306 (3rd Cir.), cert. denied, __ U.S. __, 112 S.Ct. 280, 116 L.Ed.2d 232 (1991); Gaskins v. McKeller, 916 F.2d 941, 953 (4th Cir. 1990), cert. denied, 500 U.S. 961 (1991); Byren v. Butler, 845 F.2d 501, 509 (5th Cir.), cert. denied, 487 U.S. 1242 (1988).

III. WHETHER A PROSECUTOR'S PENALTY-PHASE CLOSING ARGUMENT THAT THE DEFENDANT WOULD BE PUT TO DEATH "INSTANTANEOUSLY" AND AN ARGUMENT THAT THE COST TO TAXPAYERS OF AN EXECUTION WAS LESS THAN THE COST OF LIFE IMPRISONMENT VIOLATED THE FOURTEENTH AMENDMENT.

This issue raises the question of what standard of review is to be applied to claims of prosecutorial misconduct during penalty-phase closing arguments. In Donnelly v. DeChristoforo, 416 U.S. 637 (1974), the Court adopted a narrow due process standard for reviewing challenges to closing arguments in non-capital cases. The Court has subsequently applied Donnelly to a claim challenging the guilt-phase closing argument in a capital case, Darden v. Wainwright, 477 U.S. 168 (1986), to a claim challenging the admission of evidence during the penalty phase of a capital trial, Romano v. Oklahoma, 114 S.Ct. 2004 (1994), and the Court has suggested that Donnelly could be used to challenge improper comments made by a trial judge during the penalty phase of a capital trial, Dugger v. Adams, 489 U.S. 401, 410 (1989). The Court, however, has not squarely addressed a due process challenge to a penalty-phase closing argument of in capital trial. While the Court's precedent indicates that Donnelly applies to these claims, the Court has yet to defined the scope of review in this context.

This case presents an excellent opportunity for this Court to review a due process challenge to a penalty-phase closing argument--a claim that has arisen in almost every circuit court and, more importantly, in almost every state court--and to determine the federal constitutional parameters for penalty-phase closing arguments. The need for definitive guidance in this area was best articulated by Judge Edward

D. Robertson, Jr., of the Missouri Supreme Court when he observed:

> . . . that, [although] we [the judges of the Missouri Supreme Court] are not bound by the decisions of the Eighth Circuit, the judgments that we review ultimately find their way to that forum for an independent federal scrutiny. That federal scrutiny sometimes appears to harbor antipathy for the judgments of state courts in death cases. Worse, even decisions that I believe are profoundly incorrect--like Antwine--cast a corrupting shadow over our decisions if we choose to attempt to predict the outcome of federal review.
>
> Yet that is what the principle opinion seems to do--to predict that federal habeas review of the death sentence in this case will result in a new penalty phase hearing. That prediction is exceedingly difficult and ultimately futile. The Eighth Circuit's recent Antwine standard is at loggerheads with Blair v. Armontrout, 916 F.2d 1310 (8th Cir. 1990), cert. denied, 502 U.S. 825 (1991). Until that court adopts an en banc standard or the United States Supreme Court speaks, the composition of the judicial panel, not predictable standards, will determine the outcome.

State v. Storey, 901 S.W.2d 886, 906 (Mo. banc 1995) (Robertson, J., concurring).

In Donnelly, this Court observed that the standard of federal habeas corpus review for closing argument claims is

"'the narrow one of due process, and not the broad exercise of supervisor power that [the court] would posses in regard to [its] own trial court.'" Donnelly v. DeChristoforo, 416 U.S. at 642 (quoting the court of appeals opinion, 473 F.2d 1326, 1238 (1973)), accord, Darden v. Wainwright, 474 U.S. 168, 181 (1986). This is so because, not every error which might call for application of supervisory powers constitutes a "'failure to observe that fundamental fairness essential to the very concept of justice.'" Donnelly v. DeChristoforo, 416 U.S. at 642 (quoting Lisenba v. California, 314 U.S. 219, 236 (1941)). Indeed, in the context of closing arguments, it is not enough that the prosecutor's remarks were undesirable or universally condemned. Darden v. Wainwright, 477 U.S. at 181. Rather, "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Id., quoting Donnelly v. DeChristoforo, supra.

Although this Court has not accepted the opportunity to apply Donnelly to a penalty-phase closing argument claim, the Eleventh Circuit Court of Appeals considered this question in a series of four *en banc* decisions. Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985)(*en banc)*, vacated and remanded on other grounds, 478 U.S. 1016 (1986), aff'd, 809 F.2d 700 (11th Cir. 1987)(*en banc*); Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985)(*en banc*), cert. denied, 478 U.S. 1020 (1986); W.B. Tucker v. Kemp, 762 F.2d 1480 (11th Cir.) (*en banc*), vacated and remanded on other grounds, 474 U.S. 1001 (1985), aff'd, 802 F.2d 1293 (11th Cir. 1986), cert. denied, 480 U.S. 911 (1987); R. Tucker v. Kemp, 762 F.2d 1496 (11th Cir. 1985) (*en banc*), cert. denied, 478 U.S. 1022 (1986). Building upon this Court's holding in Donnelly, the court of appeals developed several guidelines for reviewing penalty-phase closing-argument claims.

The Eleventh Circuit found that an examination of the prosecutor's argument in the context of the entire proceeding was of primary importance. Brooks v. Kemp, 762 F.2d at 1400. In addition, the court adopted the Strickland v. Washington, 466 U.S. 668 (1984), standard of prejudice for judging whether the prosecutor's comments rendered the proceeding fundamentally unfair. Id. at 1400-02. This standard requires the court to determine whether there is a reasonable probability that, but for the arguments, the death verdict would not have been given. Id. at 1413. The court also noted that as a prerequisite to finding a due process violation the argument in question must be improper. Id. at 1408. With these guidelines in mind, the court developed a two step approach to resolving penalty-phase closing-argument claims. Id. at 1403. The court first considers whether the argument was improper and then, if necessary, the prejudicial effect of the argument.

In the instant case, the court of appeals held that the prosecutor's comment that respondent would be put to death "instantaneously" coupled with the "cost to taxpayers" argument violated respondent's due process rights. The court found both arguments to be inherently improper and improper because there was no evidence in the record to support the assertions. The court further concluded that respondent was prejudiced because

> there [was] a reasonable probability that, but for the prosecutor's misleading and uncorrected description of an "instantaneous" death and his improper and unsupported references to the economic cost of life imprisonment, the outcome of this sentencing proceeding might have been different. There is no doubt that Antwine killed Eric "George" Jones in the police holding cell, but the two

> aggravating circumstances presented to the jury were balanced by some nonstatutory mitigating circumstances that could have led the jury to choose life imprisonment if the prosecutor had not fed their fears of economic burden while easing their conscience with the idea of a quick, humane death (A-13 to A-14).

Antwine v. Delo, 54 F.3d at 1364.[4] The court of appeal opinion in this case ignores several of the key principles outlined in Brooks, thereby creating a conflict with the Eleventh Circuit's decisions in this area.

First, the court of appeals took the "instantaneous" death comment out of context in ruling that the argument was improper. The prosecutor description of an execution by lethal gas as "instantaneous" was used to compare death by lethal gas with Eric Jones' violent death and to establish respondent's belief in the death penalty. The prosecutor stated:

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[4] The court found that defense counsel's response to these arguments was inadequate and did not minimize the resulting prejudice. Petitioner finds this contention incredible with respect to the "instantaneous" death argument. Defense counsel responded by graphically describing respondent struggling to hold his breath for as long as he could before inhaling the lethal gas that would enter his system and cause his death (A-157 to A-158). Defense counsel explained that it would not be a "simple procedure where he'll breathe and it's over with. It won't be that quick" (A-157). This description provoked an outburst from one of the victim's relatives (A-158). The court of appeals disregards the fact that counsel's comments--comments that supposedly enhanced and supported the prosecutor's version of execution by lethal gas--were so disturbing that they caused an outburst from the victim's family. Clearly the victim's family did not find these comments sympathetic to the prosecution. Rather, the victim's family found them offensive and disturbing. Counsel effectively responded to the prosecutor's characterization of the execution by graphically describing the condemned's struggle for life, thereby minimizing any prejudice to respondent.

> Certainly it is a far more humane execution than this man provided Eric Jones. . . . Certainly, you can be sure of one thing. This man believes in capital punishment. This man believes in the death penalty. This man believes in execution without a trial by a judge and jury. . . . (A-149).

Although the court concluded that the prosecutor's argument was improper, the Eleventh Circuit Court of Appeals held a similar argument to be proper in Brooks.

> Correctly anticipating a defense argument that the death penalty is bad, Whisnant argued that Brooks himself believed in the death penalty. The thrust of the argument was that Brooks' execution of Galloway in a manner much more horrible than a procedurally proper, legal execution demonstrated Brooks' belief in the death penalty. Following the command of Donnelly v. DeChristoforo, 416 U.S. at 647, 94 S.Ct. at 1873, that "a court should not lightly infer that a prosecutor intended an ambiguous remark to have its most damaging meaning," we doubt that the jury understood the remark in the improper way suggested by Brooks.

Brooks v. Kemp, 762 F.2d at 1411. The thrust of the prosecutor's argument in this case likewise, was that respondent believed in the death penalty. The court of appeals' conclusion that the prosecutor's argument in this case was improper is in conflict with Brooks.

In addition to finding that the prosecutor's "instantaneous" death argument was improper, the court

found the "cost to taxpayers" argument to be improper. Petitioner concedes that this argument deserves the condemnation it received by the court of appeals. Indeed, every court considering this argument has concluded that it is improper. E.g., Brooks v. Kemp, 762 F.2d at 1415; Blair v. Armontrout, 916 F.2d 1310, 1323 (8th Cir. 1990), cert. denied, 502 U.S. 825 (1991). The court of appeals, however, failed to cite any case in which this argument standing alone, or in concert with another improper argument, has resulted in the reversal of a sentence, and petitioner can find none. Cf. Darden v. Wainwright, 477 U.S. at 480-81 and n. 13. To the contrary, the Eleventh Circuit has consistently held that this improper comment did not rise to the level of a due process violation. E.g., Brooks v. Kemp, 762 F.2d at 1415 (considering the cumulative effect of this argument and three other improper arguments); W.B. Tucker v. Kemp, 762 F.2d at 1488 (considering the cumulative effect of this argument and three other improper arguments); Gates v. Zant, 863 F.2d 1492, 1503 (11th Cir. 1989), cert. denied, 493 U.S. 945 (1989) (considering the cumulative effect of this argument and six other arguments). Thus, the court of appeals opinion in this case is in conflict with these Eleventh Circuit cases. This conflict may be explained in part by the court of appeals use of a relaxed standard of review in this case. See State v. Storey, 901 S.W.2d at 906 (Robertson, J. concurring).

In granting relief, the court of appeals did not conclude that the result of the sentencing proceeding would have been different but for the complained of arguments. Instead, the court only concluded that there was a reasonable probability that the outcome of the sentencing proceeding "might" have been different. A reasonable probability that something might happen is very different from a reasonable probability that something will happen and constitutes nothing more than speculation on the part of the court of

appeals.[5] The court of appeals' articulated standard effectively lowers a habeas petitioner's burden to show by a reasonable probability that the error in fact affected the outcome, by only requiring the petitioner to show that there was a reasonable probability that the arguments might have affected the outcome. The standard of review adopted by the court is in direct conflict with the standard of review announced in Donnelly and Brooks.

Finally, the court of appeals failed to consider the arguments in the context of entire proceeding when determining whether the proceeding was fundamentally unfair. Given the fact that the jury was instructed that the prosecutor's arguments were not evidence (E.g. A- 162), given the brevity of the remarks, given the effective response of defense counsel, given the strength of the evidence of guilt, given the strength of the evidence in support of the aggravating circumstance, and given the relative weakness of the evidence in mitigation[6], it cannot be said that the

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[5] The danger of this type of speculation was recently discussed by the Court in Wood v. Bartholomew, No. 94-1419, slip op. at 4 (U.S. October 10, 1995).

> "Whenever a federal court grants habeas relief to a state prisoner the issuance of the writ exacts great costs to the State's legitimate interest in finality. An where, as here retrial would occur 13 years later, those costs and burdens are compounded many times. Those costs may be justified where serious doubts about the reliability of a trial infested with constitutional error exist. But where, as in this case, a federal appellate court . . . grants habeas relief on the basis of little more than speculation with slight support, the proper delicate balance between the federal courts and the States is upset to a degree that requires correction."

[6] The state relied solely upon the evidence presented during the guilt phase of the trial in the penalty phase. The aggravating circumstances found were that the murder was committed in a place of lawful confinement and that the murder involved torture or depravity of mind. Two statutory mitigating circumstances

prosecutor's arguments were so egregious as to infect the trial with unfairness so as to make the resulting sentence a denial of due process. The result reached by the court of appeals in this case "leaves virtually meaningless the distinction between ordinary trial error of a prosecutor and the sort of egregious misconduct held . . . to amount to a denial of constitutional due process." Donnelly v. DeChristoforo, 416 U.S. at 647-48.

Conclusion

For the foregoing reasons, petitioner prays the Court issue a writ of certiorari and reverse the judgment of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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were submitted: that respondents did not have a history of criminal activity and respondent's age at the time of the offense. Respondent presented one witness at the penalty phase. Respondent's brother testified about the effect their mother's death had on respondent, the lack of adult male supervision respondent had during his childhood, and the fact that respondent was his last living immediate relative.

(2) 95-659

No. 95-_____

Supreme Court, U.S.
FILED
OCT 23 1995
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

MICHAEL BOWERSOX,
Superintendent of the Potosi Correctional Center,

Petitioner,

vs.

CALVERT L. ANTWINE,
A State Prisoner Under Captial Sentence,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
(Volume I)

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

MICHAEL BOWERSOX, Superintendent of the Potosi Correctional Center,	)	
Petitioner,	)	
vs.	)	
	)	No. 95-_____
CALVERT L. ANTWINE A State Prisoner Under Capital Sentence,	)	
Respondent.	)	

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-1890WM

Calvert L. Antwine,	*	
	*	
Appellant,	*	On Appeal from the
	*	United States
v.	*	District Court for
	*	the Western District
Paul Delo; Missouri	*	of Missouri.
Attorney General,	*	
	*	
Appellees.	*	

Submitted: November 14, 1994
Filed: May 12, 1995

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, Circuit Judge, and REAVLEY,* Senior Circuit Judge.

RICHARD S. ARNOLD, Chief Judge.

*The Hon. Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Calvert Leon Antwine appeals the District Court's denial of his petition for a writ of habeas corpus. We affirm in most respects, but we conclude that Antwine was denied the effective assistance of counsel during the penalty phase of his trial and that the prosecutor's penalty-phase closing argument violated Antwine's Eighth and Fourteenth Amendment rights. We therefore vacate his death sentence and remand to the District Court with directions to issue a writ of habeas corpus releasing Antwine from the sentence of death, unless the State of Missouri commences proceedings to re-sentence him within a reasonable time. The capital-murder conviction itself is upheld in all respects.

I.

On November 11, 1993, Calvert Antwine was trying to find Eric "George" Jones, one of his employers in a drug-dealing business. In the course of his search, Antwine robbed several workers who were refurbishing one of George's buildings and shot and killed Winston Jones, George's brother and business partner. When he finally encountered George, their struggle over a gun attracted police attention. The police arrested both men, handcuffed them, and placed them in a holding cell. Five or ten minutes later, an officer heard some yelling and looked into the holding cell to find George lying face down on the floor, bleeding from the nose and mouth, and Antwine sitting on a bench a few feet away. The officer checked on George, then stepped away to call for help; when he turned back, he saw Antwine in midair, coming down with both feet on George's head. George died from head injuries a few days later.

A jury convicted Antwine of capital murder, second-degree murder, and first-degree robbery. He was sentenced

to death for the murder of Eric "George" Jones, to life imprisonment for the murder of Winston Jones, and to 30 years for the robbery.

Antwine appealed his convictions. While the case was pending, the Supreme Court of the United States decided Batson v. Kentucky, 476 U.S. 79 (1986), and Griffith v. Kentucky, 479 U.S. 314 (1987). The Missouri Supreme Court remanded Antwine's case to the trial court for a Batson hearing to determine if Antwine had established racial discrimination in the State's use of peremptory challenges during jury selection.

The trial judge determined that Antwine had not made a prima facie Batson case, and the Missouri Supreme Court affirmed Antwine's convictions and death sentence. State v. Antwine, 743 S.W.2d 51 (Mo. 1987), cert. denied, 486 U.S. 1017 (1988). Antwine then filed a pro se motion for post-conviction relief under Missouri Supreme Court Rule 29.15. His appointed post-conviction counsel filed one timely and five untimely amended motions. After an evidentiary hearing on the claims raised in all the motions, the motion court denied relief. On appeal, the Missouri Supreme Court, deeming the grounds raised in the five untimely motions procedurally waived, affirmed the motion court's judgment. Antwine v. State, 791 S.W.2d 403 (Mo. 1990), cert. denied, 498 U.S. 1055 (1991).

The Missouri Supreme Court subsequently summarily dismissed the habeas petition that Antwine filed pursuant to Missouri Supreme Court Rule 91. Antwine then petitioned in federal court for a writ of habeas corpus under 28 U.S.C. § 2254. The District Court denied the writ, and Antwine appeals to this Court.

The petition raises a number of constitutional claims, most of which are either procedurally barred or without merit. But the petition does include two successful arguments: Antwine's counsel gave him ineffective assistance during the penalty phase of his trial in violation of the Sixth and Fourteenth Amendments, and the prosecutor's penalty-phase closing argument violated the Eighth and Fourteen Amendments. We turn to these claims first.

II.

Antwine argues that the prosecutor's penalty-phase closing argument violated his Eighth and Fourteenth Amendment rights. The District Court did not address this issue since it found that Antwine had procedurally defaulted all of his claims except for specific claims of ineffective assistance of counsel.

The District Court based its finding of procedural default on its conclusion that the Missouri Supreme Court had found "that the only claims not procedurally barred [were] those involving specific allegations of ineffective trial counsel." Antwine v. Delo, No. 91-0079-CV-W-1, slip op. at 4 (W.D. Mo. March 4,1993). But as we read its opinion, the Missouri Supreme Court actually found that the only claims not barred were those raised in the defendant's timely motion for post-conviction relief. Antwine, 791 S.W.2d at 406. While that motion alleged several claims of ineffective assistance of counsel, it also included an allegation that the prosecutor's closing argument violated Antwine's Eighth and Fourteenth Amendment rights.

Even though Antwine raised this allegation in his timely post-conviction motion, it was still subject to a state

procedural bar because he had not raised it in his direct appeal. The post-conviction motion court recognized this default and held that Antwine's failure to raise the issue on direct appeal barred any post-conviction relief. But the Missouri Supreme Court ignored the bar and addressed this federal claim on the merits. Antwine, 791 S.W.2d at 411. "State procedural bars are not immortal . . . ; they may expire because of later actions by state courts. If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal court review that might otherwise have been available." Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991). We are therefore free to consider the merits of Antwine's claim.

Antwine's claim involves two parts. First, he argues that the prosecutor's closing argument diminished the jury's sense of responsibility for imposing the death sentence, in violation of the Eighth Amendment under Caldwell v. Mississippi, 472 U.S. 320 (1985). Second, he alleges that the prosecutor's argument was so inflammatory that it rendered the entire sentencing proceeding fundamentally unfair and denied him due process. We agree with both contentions.

During his closing argument in the penalty phase of Antwine's trial, the prosecuting attorney stated:

> Let there be no question, we are asking you to put this defendant to death. . . . [H]e will be taken into a room. There will be witnesses that will come down. There will be a priest present. He will be asked if he has any last request . . . . He will be put in a chair. A pellet will be dropped into acid, and when he

> inhales that, he would be put to death instantaneously.

(Trial Tr. at 928-29.) The prosecutor's argument suggests that a condemned prisoner's death will be quick, painless, and humane: one quick breath, and the defendant will die at once. The reality, as we understand it, is or at least may be quite different. Eyewitness accounts of gas-chamber executions describe death throes lasting ten minutes or more; the inmate even remains conscious for the first few minutes after breathing the gas. Kevin Fagan, "Mason Dies as He Said He Would," San Francisco Chronicle, Aug. 25, 1993, at A1 (comparing the 14 minutes it took for David Mason to die to the 10 minutes it took for Robert Alton Harris, and noting that Mason was unconscious after the first three minutes); Kevin Leary, "Eyewitness to Execution," Ottawa Citizen, April 22, 1992, at A2 (noting that Harris appeared to lose consciousness one-and-one-half minutes after breathing the gas); John Hiscock, "Killer Dies After Night of Reprieves," The Daily Telegraph, April 22, 1992, at 1 (reporting that witnesses gave varying estimates of two to seven minutes for the time it took Robert Alton Harris to lose consciousness). Such a death is hardly "instantaneous."

Antwine's trial counsel did try to address the prosecutor's unfounded description by painting his own picture of the process, but he failed to challenge or even question the prosecutor's claim that Antwine would die as soon as he breathed the gas. He focused instead on the futile resistance leading up to the fatal breath:

> It's not going to be a simple procedure where he'll breathe and it's over with. It won't be that quick.

> He may try to hold his breath. No matter how hard he'll try to do that, it just won't work. He'll have to breathe. His body will have to try to get some oxygen, and then . . . the gas will go into his lungs. As the oxygen moves into his bloodstream, then he'll die.

(Trial Tr. at 939-40.) Indeed, the defense counsel's description actually supports the prosecutor's suggestion that the prisoner will instantly die when he breathes the gas.

So where is the harm in this vision of a quick and easy death? The danger is that the jurors, faced with a very difficult and uncomfortable choice, will minimize the burden of sentencing someone to death by comforting themselves with the thought that the death would at least be instantaneous, and therefore painless and easy. The prosecutor's argument diminished the jurors' sense of responsibility for imposing the death penalty.

This diminution of the jury's sense of responsibility undermines the Eighth Amendment's heightened need for "the responsible and reliable exercise of sentencing discretion" in capital cases. Caldwell, 472 U.S. at 329. The assurance of a quick and easy death -- like the assurance of appellate review that was denounced in Caldwell -- "is no valid basis for a jury to return a sentence if otherwise it might not. It is simply a factor that in itself is wholly irrelevant to the determination of the appropriate sentence." Id. at 336.

We cannot say that the prosecutor's description of an "instantaneous death had no effect on the sentencing decision.

A decision based on such an argument does not meet the standard of reliability that the Eighth Amendment requires. On this basis alone, we hold that Antwine's sentence is constitutionally invalid.

Even if the prosecutor's description of the execution process had been accurate, there would still be a due-process question, because there was absolutely no evidence int he record to support what the prosecutor said. See, e.g., United States v. Bigeleisen, 625 F.2d 203, 210 (8th Cir. 1980) (finding due-process violation in combination of prosecutor's reference to facts not in the record and his failure to correct witness's false testimony). But the prosecutor went even further. In addition to his unsupported description of an "instantaneous" death, the prosecutor made the following comments to the jury in his closing argument:

> Why should you and I, as lawful, working citizens of this community, work the rest of our natural lives just so Calvert Antwine can live in the penitentiary for the rest of his natural life or at least until he's served 50 years in prison?

(Trial Tr. at 933.)

> [I]sn't it much more humane to sentence this man to death so that his brother can get on with his life, and so that the two children can get on with their lives, instead of having to think, every day for the next 50 years, they have a brother or a father locked up in the penitentiary?

(Trial Tr. at 935-36.) Like the District Court, we agree with Chief Justice Blackmar that these comments have "no place in an American courtroom." Antwine, 743 S.W.2d at 74 (Blackmar, C.J., dissenting). The question we must answer is whether these comments, combined with the misleading and unsupported description of an "instantaneous" death, were prejudicial enough to render the entire sentencing proceeding fundamentally unfair and a violation of Antwine's right to due process.

This Court described the method for analyzing a potential due-process violation in a prosecutor's closing argument in Newlon v. Armontrout, 885 F.2d 1328, 1337 n.10 (8th Cir. 1989), cert. denied, 497 U.S. 1038 (1990). When we find that a prosecutor has made improper comments during his closing argument, we must: (1) measure the type of prejudice that arose from the argument; (2) examine what defense counsel did in his argument to minimize the prejudice; (3) review jury instructions to see if the jury was properly instructed; and (4) determine if there is a reasonable probability that the outcome of the sentencing phase would have been different, taking into account all of the aggravating and mitigating circumstances. Id.

Using this analysis, we found a due-process violation in Newlon, where the prosecutor had made a number of irrelevant and unsupported statements that could undermine both the jury's sense of responsibility for imposing the death penalty and its duty to base such a sentence on the defendant's individual circumstances and crime. In brief, the prosecutor in that case:

> (1) expressed his personal belief in the propriety of the death sentence and implied

> that he had special knowledge outside the record; (2) emphasized his position of authority as prosecuting attorney of St. Louis; (3) attempted to link petitioner with several well-known mass murderers; (4) appealed to the jurors' personal fears and emotions; and (5) asked the jurors to "kill him now. Kill him now."

Id. at 1335.

The remarks in Newlon were "neither isolated nor ambiguous." Id. at 1338 (quoting Newlon v. Armontrout, 693 F. Supp. 799, 808 (W.D. Mo. 1988)). The defense attorney made no effort to cure the improper argument, either through objection or response. The jury was instructed that the attorneys' closing arguments were not evidence, but that instruction was not sufficient to cure the error. Id. at 1337. After determining that there was a reasonable probability that the outcome of the penalty phase would have been different without the prosecutor's improper comments, we held that the comments prejudiced Newlon and violated his right to due process.

In Blair v. Armontrout, 916 F.2d 1310 (8th Cir. 1990), cert. denied, 502 U.S. 825 (1991), by contrast, we found no due-process violation when the prosecutor made a single, brief comment, even though that comment was so improper and prejudicial that we had "no hesitation in condemning [it]." Blair, 916 F.2d at 1323. The prosecutor made the challenged statement "without pause or repetition" during a "tough, hard-hitting argument . . . based on the hard facts presented." Id. at 1324. Accordingly, we determined that the one, isolated comment was "not sufficiently

prejudicial . . . to render Blair's sentencing hearing fundamentally unfair." Id. at 1325.

The prosecutor's closing argument in this case lies somewhere between the arguments made in Blair and Newlon. The challenged comments are more than Blair's brief, isolated comment in the midst of a hard-hitting, fact-based argument, but they are somewhat less than Newlon's "relentless, focused, uncorrected argument based on fear, premised on facts not in evidence, and calculated to remove reason and responsibility from the sentencing process." Newlon, 885 F.2d at 1338 (quoting Newlon, 693 F. Supp. at 808).

The closing argument here was improper and prejudicial. The comment we so strongly condemned in Blair is almost identical to the comment made by the prosecutor in this case about the taxpayers' burden for life imprisonment.[1] As we said in Blair, "[t]here is simply no legal or ethical justification for imposing the death penalty on this basis and it is not a proper factor to be considered by the jury, for it does not reflect the properly considered circumstances of the crime or the character of the individual."

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[1]The prosecutor in Blair argued:

> Why should we as taxpayers have to house this man for fifty years? Why should we have to feed him three meals a day for fifty years, clothe him for fifty years, furnish him recreation, medical care?

Blair, 916 F.2d at 1322.

Id. at 1323. That reasoning applies equally well to comments such as "death will be instantaneous" and "let the [defendant's] family get on with their lives."

As in Newlon, then, the prosecutor's closing argument contained a number of irrelevant and unsupported statements that could undermine the jury's sense of responsibility and its individualized consideration of the defendant. The comments were less numerous and thematic than those in Newlon, but they were not so isolated as the single comment in Blair. The prosecutor's argument, moreover, included a comment that we have already determined violates the Eighth Amendment, and, as we noted in Newlon, an Eighth Amendment analysis can bolster a finding of a due-process violation. Newlon, 885 F.2d at 1337.

Defense counsel effectively responded to the prosecutor's suggestion that it would be more humane to kill the defendant and let his family get on with their lives (Trial Tr. 936-37, 938-39). He failed, however, to object or respond to the improper, unsupported, and inaccurate[2]

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[2]A recent study demonstrates that the cost of sentencing someone to death greatly exceeds the cost of sentencing him to life imprisonment. Philip J. Cook and Donna B. Slawson, The Costs of Processing Murder Cases in North Carolina 1 (Duke University 1993) (finding that the cost of sentencing someone to death exceeds the cost of life imprisonment by $163,000, and noting that when the cost of cases that are adjudicated capitally but that do not result in execution are considered, the extra cost per death penalty imposed is $250,000; the extra cost per execution is $2 million). And, even if this study is itself questionable, the fact remains that

argument that a death sentence would be cheaper for the taxpayers than life imprisonment. He made no effort whatsoever to cure the prosecutor's attempt to lure the jury into choosing the death penalty for its economic efficiency rather than for its appropriateness to the defendant's crime. He also failed to object to the unsupported description of an "instantaneous" death, and his ineffective response supported, rather than rebutted, the idea that the defendant would die instantaneously.

As in Newlon, the jury was instructed that the attorneys' closing arguments were not evidence. Once again, we conclude that such an instruction, standing alone, cannot shield prosecutorial misbehavior. If it did, even the most outrageously flagrant violations would be untouchable. Newlon, 885 F.2d at 1337.

Finally, we determine that there is a reasonable probability that, but for the prosecutor's misleading and uncorrected description of an "instantaneous" death and his improper and unsupported reference to the economic costs of life imprisonment, the outcome of this sentencing proceeding might have been different. There is no doubt that Antwine killed Eric "George" Jones in the police holding cell, but the two aggravating circumstances presented to the jury were balanced by some nonstatutory mitigating circumstances that could have led the jury to choose life imprisonment if the prosecutor had not fed their fears of economic burden while

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there was no evidence before the jury on the costs of execution or life imprisonment, so it was a violation of due process for the State to refer to it in closing argument.

easing their conscience with the idea of a quick, humane death.

We conclude that the prosecutor's closing argument in the penalty phase of the trial violated Antwine's due-process rights under the Fourteenth Amendment, thus providing a separate basis for our holding that Antwine's sentence is constitutionally invalid.

III.

Antwine also claims that his right to the effective assistance of counsel was violated when his trial counsel (1) failed to investigate fully and present mitigating evidence of Antwine's mental condition, and (2) failed to object to the prosecutor's inflammatory penalty-phase closing argument. Since the Missouri Supreme Court considered both of these claims on the merits (they were presented in the timely amended Rule 29.15 motion), we are not procedurally barred from considering them.

To grant relief based on a claim of ineffective assistance of counsel, we must find both that counsel's performance was constitutionally ineffective and that the ineffective performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 700 (1984). To be constitutionally ineffective, counsel's performance must fall below an objective standard of reasonableness. Id. at 687-88. The defendant must overcome a strong presumption that counsel provided effective assistance, and we do not use hindsight to question counsel's performance. Id. at 689-90; Kenley v. Armontrout, 937 F.2d 1298, 1303 (8th Cir.), cert. denied, 502 U.S. 964 (1991).

If counsel's performance was unconstitutionally ineffective, the question then becomes whether that ineffectiveness undermines our confidence in the outcome of the proceeding. When a defendant challenges a conviction, we ask whether there is a reasonable probability that the defendant would not have been found guilty if counsel's performance had not been ineffective. When a death sentence is challenged, the issue is whether there is a reasonable probability that, but for counsel's deficient performance, the jury would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death. Strickland, 466 U.S. at 695.

A.

Antwine argues first that his trial counsel was ineffective in failing to investigate fully and present evidence of his mental condition at the time of the murder, and that this ineffectiveness prejudiced his defense at both the guilt and penalty phases of his bifurcated trial.

Counsel did request and receive a court-ordered mental examination for Antwine within four months of the offense. The exam, though, consisted of only one 20-minute interview and a review of the police background sheet. From this, the state psychiatrist concluded that Antwine did not suffer from any mental disease or defect, and that his actions at the time of the offense were consistent with PCP intoxication.

Although the state psychiatrist had found that Antwine's behavior was consistent with PCP intoxication, trial counsel knew that Antwine denied using PCP at the time of the offense. He was also aware that there were indications

in the police report that Antwine had been acting strangely a few days before the offense. Indeed, several witnesses that counsel interviewed claim that they tried to tell him about Antwine's odd behavior. But since counsel found Antwine to be articulate, lucid, and cooperative, he did not request an independent, second mental examination, even though Antwine had a right to such a second examination under state law.

A battery of examinations conducted several years after the offense at the request of post-conviction counsel produced evidence that Antwine suffers from bipolar disorder, a lifetime condition that usually arises in early adulthood. If, as seems likely, Antwine had the disorder at the time of the offense, counsel would probably have discovered it during a full investigation of Antwine's mental condition.

The Rule 29.15 motion court, however, found "no credible evidence to support the defendant's claim that he suffered from a mental disease or defect," Antwine v. Delo, No. CV88-14232, slip op. at 10-11 (Mo. Cir. Ct., Sept. 5, 1989), an the State argues that this state-court finding is entitled to a presumption of correctness under 28 U.S.C. § 2254. We disagree. The issue is whether the failure to discover and present evidence of Antwine's mental condition undermines our confidence in the outcome of either the guilt or sentencing phase of the trial. We are concerned, then, with whether the jury -- not the motion court -- would have found the evidence of Antwine's mental condition credible.

Of course, the motion court's finding of "no credible evidence" implies that if Antwine had presented the evidence at his trial, the jury, like the motion court, would not have

believed it. But the reasons the motion court gave for not crediting the evidence of Antwine's mental condition do not support this inference.

First, the motion court suggested that the initial mental examination could not be unreliable or substandard merely because it was limited to a twenty-minute examination, when the second examiner, Dr. O'Connor, also gave Antwine a twenty-minute examination. But the first examiner based his conclusions on nothing more than that twenty-minute exam. Dr. O'Connor based his on the consistent results of two very different personality tests, the MMPI and the Rorshach, which he administered after a twenty-minute exam and a forty-minute history interview.

Second, the court dismissed Dr. O'Connor's findings because he did not request or perform any blood tests, even though such tests "are available to positively determine the existence of a Bi-Polar Disorder." Antwine v. Delo, No. CV88-14232, slip op. at 10 (Mo. Cir. Ct., Sept. 5, 1989). This conclusion is not supported by the record. Dr. O'Connor testified that there are three methods of determining the existence of a bipolar disorder: observation, blood tests, and personality tests (Hearing Tr. at 171-72). According to Dr. O'Connor's testimony -- and there is no other evidence in the record on this issue -- the "reliability of the blood test is almost as good as the reliability of the MMPI" (id. at 238). Thus, the record does not support the contention that the blood test "positively determines" the existence of the disorder. A blood test could certainly confirm the results of the MMPI and the Rorschach, but there is nothing in the record to indicate that such confirmation is necessary. Personality tests are an accepted and reliable

diagnostic indicator of bipolar disorder in and of themselves.

The motion court also faulted Dr. O'Connor for failing to interview defendant's friends and family about his behavior and history. Again, such a step would have been additional evidence to confirm the personality test results, but there is nothing in the record to show the need for such confirmation.

Third, the motion court found that, while Dr. O'Connor stated that there was a reasonable probability that defendant suffered from bipolar disorder at the time of the offense, he could not state with certainty that defendant suffered from a manic episode on that day. The court found that the police officers' observations of Antwine's conduct were inconsistent with a manic episode. In fact, Dr. O'Connor testified that he thought it reasonably probable that Antwine was suffering from a manic episode at the time of the offense, and he pointed to the officers' observations as support for his opinion (id. at 261, 264-65).

Finally, the motion court found that Dr. O'Connor's diagnosis was not credible because it was based on an exam that occurred five years after the offense. Had counsel been effective, though, the examination would have been made shortly after the offense occurred. The question we must ask is whether a jury would have credited Dr. O'Connor's diagnosis if it had been presented to them at the trial, and whether the failure to present the evidence undermines our confidence in the proceeding. We believe that the jury might well have believed Dr. O'Connor's testimony if he had diagnosed Antwine's condition shortly after the offense.

Counsel stated at the 29.15 hearing that the only reason he could think of for getting a second mental examination -- "at least as far as the guilt phase is concerned" (Hearing Tr. at 730) -- would be to show diminished capacity in a bid for a jury verdict of second-degree murder. Since the defendant's goal was acquittal rather than a reduced sentence, counsel decided not to investigate or pursue a diminished-capacity defense. He gave no reason, though, for not requesting a second examination in preparation for the penalty phase of the capital murder trial.

At trial, counsel focused on a self-defense theory. Antwine testified that he wanted out of the drug business, but that the Jones brothers told him that would cause problems. According to Antwine, Winston threatened his family when he reiterated his desire to leave the business. When Antwine told Winston to leave his family out of it, Winston picked up a pair of scissors and said, "You must be ready to die." Antwine drew a gun, shot out the television, and said, "I'm not playing." When Winston went for his own gun, Antwine shot and killed him.

A few hours later, Antwine was placed in a holding cell with George Jones after both men were arrested for struggling over a gun in the street. Antwine testified that George asked him what he had done to his brother. After Antwine replied that he had shot Winston, George swore that he would "get" Antwine, pointing out that he could post bond and get out of jail before Antwine could. Antwine testified that George then attacked him; after a brief fight, an officer found George on the floor, semi-conscious. Moments later, the officer saw Antwine stomp on George's head.

Antwine's testimony was the only direct evidence that trial counsel presented to support the theory of self-defense.[3] The jurors may have accepted the defense in part when they convicted Antwine of second-degree rather than capital murder for Winston's death. But when they convicted him of capital murder for George's death, they rejected the idea that Antwine had killed George -- handcuffed, bleeding, and semi-conscious on the floor of the holding cell -- in self-defense.

At the penalty phase, counsel relied on an emotional plea for mercy. The only witness presented by the defense was Antwine's brother, who asked the jury for mercy. At the 29.15 hearing, counsel explained that he had considered putting on elaborate evidence of mitigation, but had rejected the idea in favor of an emotional beg-for-mercy approach. He was concerned that the guilty verdict indicated that the jury had decided to give Antwine the death penalty, and felt that the best course would be an appeal to their compassion. Counsel also stated that he would have lost credibility if he had presented evidence of a mental impairment at the penalty phase, because such evidence would be inconsistent with the self-defense claim presented in the guilt phase.

The Missouri Supreme Court found that counsel's decision to reject an elaborate presentation of mitigating evidence in favor of an emotional appeal to mercy in the penalty phase was a reasonable trial strategy, as was his conclusion that a mental-impairment argument would be

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[3]The other five witnesses called by the defense testified to Antwine's residence and the Jones brothers' general reputation for violence.

inconsistent with the trial claim of self-defense. Antwine, 791 S.W.2d at 407-08. The District Court agreed.

But "strategic choices made after less than complete investigation are reasonable [only] to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. The issue is whether it was reasonable to decide not to investigate Antwine's mental condition more fully. If it was, then counsel's subsequent decision to reject strategies based on Antwine's mental condition was also reasonable. But if limiting the investigation was not reasonable, then neither was the subsequent strategic choice. "[S]trategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel." Kenley, 937 F.2d at 1304.

"'Given the severity of the potential sentence and the reality that the life of [the defendant] was at stake,' we believe that it was [counsel's] duty . . . to collect as much information as possible about [the defendant] for use at the penalty phase of his state court trial." Hill v. Lockhart, 28 F.2d 832, 845 (8th Cir. 1994) (citations omitted), cert. denied, 115 S. Ct. 778 (1995). Counsel's failure to request a second mental examination is more like inadequate trial preparation than a strategic choice. Counsel was aware that Antwine had been acting oddly before the offense; that a cursory mental examination conducted four months after the offense found that Antwine's behavior at the time of the offense was abnormal, but consistent with PCP intoxication; and that, while Antwine admitted to using PCP at other times, he denied using PCP at the time of the offense. If Antwine's abnormal behavior was not due to PCP intoxication, what was its cause? Antwine's trial counsel

should have followed through on this question. Cf. O'Neal v. Delo, 44 F.3d 655, 660 (8th Cir. 1995) (counsel was not ineffective for failing to pursue second mental examination after court denied request when there was no evidence that defendant exhibited any indicia of an abnormal mental state); Sidebottom v. Delo, 46 F.3d 744 (8th Cir. 1995) (counsel not ineffective for relying on results of first mental exam when neither defendant nor his family could provide any information to contradict the examiner's findings).

Did counsel's omission prejudice the defense? If counsel had fully investigated Antwine's mental condition, it seems likely that he would have discovered evidence that Antwine suffered from bipolar disorder. If counsel had then presented evidence that Antwine was in the throes of a manic episode during the offense, the jury might have found that he did not have the specific intent -- cool deliberation -- required for capital murder. Perhaps such evidence would have even bolstered (rather than contradicted) Antwine's claim of self-defense by explaining why his reaction to George's threat was so extreme. The jury might have found reasonable doubt in the absence of counsel's ineffectiveness -- but it might not have. We are not so uncertain about the fundamental fairness of the guilt phase that our confidence in the outcome is shaken. Even if the jury believed that Antwine was manic during the murder, they still could have found that his calm demeanor immediately before and immediately after the killing indicated cool deliberation. Moreover, Antwine himself insisted on presenting only the kind of defense that would have produced an acquittal. He rejected any theory that would have led merely to a conviction of a lesser offense. We cannot say that there is a reasonable probability that the jury's verdict would have been different if counsel had made a complete investigation.

Indeed, in the face of Antwine's own firm decision against a less-than-complete defense, we cannot say that it was unreasonable of counsel not to make a diminished-capacity argument in the guilt phase.

We do hold, though, that there is a reasonable chance that Antwine would not have been sentenced to death if counsel had effectively presented evidence of Antwine's mental impairment at the penalty phase. Under Missouri law at the time of the offense, Antwine would have automatically received a life sentence if only one juror had refused to vote for the death penalty. 1978 R.S. Mo. §§ 565.006, 565.008 (repealed october 1, 1984). An effective presentation of Antwine's mental condition would have required the submission of additional statutory mitigating instructions. Since the jury found only two aggravating circumstances, the balance of aggravating and mitigating circumstances in the penalty phase of the trial would have been altered enough to create a reasonable probability that the jury would not sentence Antwine to death. See Hill, 28 F.3d at 846 (finding reasonable probability that jury would not have given death penalty if counsel had discovered and presented mitigating circumstances of defendant's mental disorder). We therefore hold that Antwine's sentence is constitutionally invalid under the Sixth and Fourteenth Amendments.

B.

Antwine's second claim of ineffective assistance of counsel rests on his trial counsel's failure to object to the prosecutor's inflammatory closing argument during the penalty phase of the trial. The only practical effect of counsel's failure to object would be that the issue was not preserved for appeal, and, as we have shown, the Missouri

Supreme Court reached the merits on the issue of the closing argument's constitutionality. Whether or not it was ineffective to fail to object to the argument is therefore irrelevant.

IV.

The remainder of Antwine's arguments are either procedurally barred or without merit. We address each in turn.

A.

Antwine contends first that his constitutional right to an impartial jury was violated when four venirepersons were improperly excluded for cause. The Missouri Supreme Court held that the trial judge did not abuse his discretion by excluding the challenged jurors, and we agree with the District Court that the record supports that holding.

The impartiality of a potential juror is a question of fact, and we defer to a state-court finding of juror bias if it is fairly supported by the record. 28 U.S.C. § 2254(d); Murray v. Delo, 34 F.3d 1367, 1377 (8th Cir. 1994). We review the entire record to determine whether a prospective juror was qualified. Murray, 34 F.3d at 1377; see State v. Smith, 649 S.W.2d 417, 425-26 (Mo. banc), cert. denied, 464 U.S. 908 (1983). If the juror's views on the death penalty would "prevent or substantially impair the performance of his duties as a juror," Wainwright v. Witt, 469 U.S. 412, 424 (1985), then he was properly excluded.

Each of the challenged venirepersons expressed doubt as to whether he or she would be able to consider imposing

the death penalty. The Missouri Supreme Court found that two of the venirepersons, Briggs and Garrett, "initially expressed unequivocal opposition to imposing the death penalty in the case before them." Antwine, 743 S.W.2d at 61. Venireperson Garrett's initial opposition wavered when defense counsel asked if he could consider the death penalty against someone like Adolf Hitler; Venireperson Briggs hesitated when defense counsel asked her whether she could consider imposing the death penalty if a small child had been brutally murdered. Id. The Court concluded that their willingness to consider the death penalty in extreme hypothetical situations did not "render[] either of them immune from exclusion from the jury for cause." Id. We agree.

The other challenged jurors, Venirepersons May and Reyes,[4] were more ambiguous about their ability to render an impartial verdict. Ms. Reyes, for example, expressed her position as follows:

> MR. DAKOPOLOS: Ms. Reyes, you indicated in the courtroom that you had some difficulty with the death penalty; is that correct?

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[4]The State contends that Antwine's claim regarding the exclusion of Ms. Reyes is barred because he did not raise it on direct appeal. We have reviewed the briefs submitted to the Missouri Supreme Court on direct appeal and find that Antwine complained of the exclusion of Ms. Reyes as well as that of Ms. Briggs, Mr. Garrett, and Ms. May. Thus, no bar exists.

VENIREPERSON REYES: Yes.

MR. DAKOPOLOS: And that is a religious, moral, or -- belief or --

VENIREPERSON REYES: Yes. I think it's against my religion.

MR. DAKOPOLOS: What religion is that?

VENIREPERSON REYES: Catholic.

MR. DAKOPOLOS: Catholic religion. And because of the Catholic religion, would you find it impossible to vote the penalty of death under any circumstances, []regardless of what the circumstances in this case might prove?

VENIREPERSON REYES: It would be a little bit difficult.

MR. DAKOPOLOS: Well, when you say a little bit difficult, that's kind of hard for us to gauge. . . . [W]ould your attitude toward the death penalty prevent you from making a fair and impartial decision as to the defendant's guilt?

VENIREPERSON REYES: Yes, I believe so.

MR. DAKOPOLOS: And when you say you believe so, are you certain of that?

VENIREPERSON REYES: Yes.

(Trial Tr. at 88-89.) Ms. May expressed a similar opposition. Even from the cold record, the trial court's decision to excuse these venirepersons for cause is fairly supported. If the answers were somewhat ambiguous, the court was entitled to resolve the ambiguity in the State's favor, particularly given the court's superior position for assessing the potential jurors' demeanor and credibility. Wainwright, 469 U.S. at 434.

While Antwine does not dispute the prospective jurors' expressions of doubt about their ability to consider imposing the death penalty, he points out that those doubts were expressed only after the prosecutor gave an opening statement at voir dire that detailed the particular circumstances of his crime. Antwine argues that when the venirepersons were then asked about their ability to consider the death penalty, their answers reflected their opinion as to whether death could be an appropriate sentence in this case: those who answered "no" might have been willing to consider the death penalty for certain crimes, but from what they had heard, this was not such a case. Similarly, those who answered "yes" were not just willing to consider sentencing someone to death, they were willing to consider doing so on these facts.

We are not convinced that the prosecutor's detailed opening statement at voir dire was improper or that it rendered these venirepersons immune from exclusion for cause. "If [a juror] knows enough about the case to know that she could not consider imposition of the death penalty regardless of what evidence might be presented, she must be excused." Williams v. Maggio, 679 F.2d 381, 386 (5th Cir.

1982) (affirming exclusion of potential juror who could not consider the death penalty for a murder committed during a robbery), cert. denied, 463 U.S. 1214 (1983). The challenged venirepersons all stated that they would not be able to consider imposing the death penalty -- a considerable impairment to their ability to perform a juror's duties in a capital-murder trial. Because the record fairly supports the state court's finding of juror bias, we deny Antwine's claim.

B.

Antwine argues next that his conviction is unconstitutional because the prosecutor violated Batson v. Kentucky, 476 U.S. 79 (1986), and Swain v. Alabama, 380 U.S. 202 (1965), by using his peremptory strikes to eliminate African-Americans from the jury. We disagree.

While this case was on direct appeal, the Missouri Supreme Court remanded it for a Batson hearing. On remand, the trial court held that Antwine had failed to make a prima facie showing of racial discrimination under Batson. Antwine appealed, and the Missouri Supreme Court affirmed. Antwine, 743 S.W.2d at 63-67.

We have cited the Missouri Supreme Court's careful analysis in Antwine several times. Elem v. Purkett, 25 F.3d 679, 682-83 (8th Cir. 1994); Jones v. Jones, 938 F.2d 838, 844 (8th Cir. 1991). We particularly approved of the Court's framework for determining whether a prosecutor's neutral, nondiscriminatory reasons for striking African-American jurors were sufficient to rebut a prima facie case of discrimination. Elem, 25 F.3d at 683. The Missouri Supreme Court applied that analysis in this case to find that the prosecutor's racially neutral reasons for striking African-

American jurors were indeed sufficient and not pretextual. Antwine, 743 S.W.2d at 67. Even if Antwine can, as he asserts, make a prima facie case of discrimination under Swain by showing the prosecutor's history of racial discrimination, that showing could be rebutted by the prosecutor's nondiscriminatory reasons for striking the African-American jurors in this case. Horton v. Zant, 941 F.3d 1449, 1459 (11th Cir. 1991), cert. denied, 503 U.S. 952 (1992). Those reasons are sufficient to defeat a claim of racial discrimination under either Swain or Batson; we therefore deny Antwine's claim.

C.

Antwine also challenges his conviction on the ground that the jury instructions defined "reasonable doubt" as "proof which leaves you firmly convinced." This definition, Antwine contends, allowed the jury to convict him on a lesser standard than constitutionally required. We need not proceed to the merits of this claim because we have previously held that it is barred by Teague v. Lane, 489 U.S. 288 (1989). Murray, 34 F.3d at 1382.

D.

Finally, Antwine raises three arguments regarding the jury instructions given during the penalty phase of his trial. He asserts that his death sentence is unconstitutional because (1) the jury was instructed that a finding of mitigating circumstances had to be unanimous, in violation of Mills v. Maryland, 486 U.S. 367 (1988); 2) the mitigating-circumstance instruction improperly limited the mitigating circumstances that the jury could consider; and (3) the instruction that an aggravating circumstance existed if the

murder involved "torture or depravity of mind" was unconstitutionally vague. Each of these claims is both procedurally barred and without merit.

Antwine defaulted these claims by failing to raise them in his motion for a new trial or his direct appeal. Antwine, 791 S.W.2d at 406. We need not determine if he can overcome this procedural bar since the claims all fail on the merits. This Circuit has previously considered and rejected all three claims. Battle v. Delo, 19 F.3d 1547, 1558-62 (8th Cir. 1994) (rejecting same claims based on identical instructions); Murray, 34 F.3d at 1381, 1382 (rejecting Mills claim and aggravating-circumstance claim); Mathenia v. Delo, 975 F.2d 444, 449-50 (8th Cir. 1992) (rejecting aggravating-circumstance claim where, as here, Missouri Supreme Court found that evidence supported finding of torture or depravity of mind), cert. denied, 113 S.Ct. 1609 (1993). We are bound by our prior holdings to reject all three claims on the merits.

V.

In conclusion, we hold that Antwine's conviction is valid, but that his death sentence violates the Sixth, Eighth, and Fourteenth Amendments because he received ineffective assistance of counsel during the penalty phase of his trial and because the prosecutor's penalty-phase closing argument was improper. We vacate his death sentence and remand to the District Court with directions to issue a writ of habeas corpus releasing Antwine from the sentence of death, unless the State of Missouri commences proceedings to resentence him within a reasonable time.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

CALVERT ANTWINE,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 91-0079-CV-W-1
	)	
PAUL DELO, et al.,	)	
	)	
Respondents.	)	

ORDER

Petitioner, Calvert Antwine, asks the Court to issue a Writ of Habeas Corpus under 28 U.S.C. § 2254. The Court, after an extensive review of the record, dismisses the Writ of Habeas Corpus for the reasons stated below.

I. Procedural History

A full description of the offenses that occurred on November 11, 1983, is found in State v. Antwine, 743 S.W.2d 51 (Mo. 1987) (en banc), cert. denied, 486 U.S. 1017, 108 S. Ct. 1755, 100 L. Ed. 2d 217 (1988). A jury convicted petitioner of capital murder, second-degree murder and first-degree robbery; on August 30, 1985, the jury sentenced petitioner to die.

While petitioner's direct appeal before the Missouri Supreme Court was pending, the United States Supreme Court decided Batson v. Kentucky, 476 U.S. 79, 106 S. Ct.

1712, 90 L. Ed. 2d 69 (1986) (Peremptory challenges used to remove blacks from the jury may violate the Equal Protection Clause of the 14th Amendment) and Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) (Batson is retroactive). The Missouri Supreme Court remanded the present case back to the trial court to determine if there was a Batson violation. The trial court found that petitioner did not establish a prima facie case for a Batson violation and the Missouri Supreme Court affirmed. On May 16, 1988, the United States Supreme Court denied petitioner's Writ of Certiorari. Antwine v. Missouri, 486 U.S. 1017, 108 S. Ct. 1755, 100 L. Ed. 2d 217 (1988).

Petitioner filed a pro se Motion for Post-Conviction Relief under Missouri Supreme Court Rule 29.15 on June 7, 1988. The Missouri Supreme Court appointed counsel for petitioner and allowed counsel thirty days in which to file an amended motion. Counsel filed six amended motions. The motion court accepted all six amended motions although all six were untimely filed. On September 5, 1989, the motion court denied the Motion for Post-Conviction Relief. The Missouri Supreme Court accepted the first amended motion and barred the other five. On June 19, 1990, the Missouri Supreme Court affirmed the motion court and on July 31, 1990, denied petitioner's Motion for Rehearing. The United States Supreme Court denied petitioner's Writ of Certiorari on January 14, 1991. Antwine v. Missouri, ___ U.S. ___, 111 S. Ct. 769, 112 L. Ed. 2d 789 (1991).

Petitioner filed a Petition for Writ of Habeas Corpus under Missouri Supreme Court Rule 91 on January 24, 1991. Four days later, two of which comprised a weekend, and without waiting for a response from the State, the Missouri

Supreme Court summarily dismissed the petition on January 26, 1991.

On January 28, 1991, petitioner filed a Writ of Habeas Corpus in this Court. The next day, the Court stayed execution and appointed counsel for petitioner. Petitioner filed an Amended Petition for a Writ of Habeas Corpus on September 17, 1991, one day after the parties' Stipulation for Extension of Time to file an amended petition.

Petitioner argues a plethora of reasons for this Court to grant his Petition for Writ of Habeas Corpus.[1] Before the Court can determine the merits of any of petitioner's allegations, it must determine if petitioner is procedurally barred from raising the allegations in this Court.

II. Procedural Bar

Petitioner failed to timely raise most of the claims he alleges in his petition before this Court in his Rule 29.15 post-conviction appeal to the Missouri Supreme Court.[2] The

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[1]Petitioner alleges fifteen different groups of federal constitutional error and within each group, petitioner alleges as many as 65 federal constitutional errors.

[2]Petitioner also failed to raise many of the allegations he now alleges in his petition before this Court in his Motion for New Trial or in his direct appeal to the Missouri Supreme Court, but the Missouri Supreme Court decided the merits of some of these allegations in its decision denying petitioner post-conviction relief under Rule 29.15. Ylst v. Nunnemaker, 501 U.S. ___, 111 S. Ct. 2590, 115 L. Ed. 2d 706, 716-17

only motion that was timely filed was petitioner's pro se Rule 29.15 Motion for Post-Conviction Relief, but the motion court accepted all six of petitioner's amended motions. The Missouri Supreme Court acccepted petitioner's first amended motion, but held that all claims not raised in the first amended motion were procedurally barred. Antwine v. State, 791 S.W.2d 403, 406 (Mo. 1990) (en banc), cert. denied, ___ U.S. ___, 111 S. Ct. 769, 112 L. Ed. 2d 789 (1991). Even though petitioner's first amended motion was also filed out of time, because the Missouri Supreme Court discussed its merits, the claims in that motion are not procedurally barred. The procedural default doctrine does not apply if the last state court rendering a judgment in the case reached the merits. Ylst v. Nunnemaker, 501 U.S. ___, 111 S. Ct. 2590, 115 L. Ed. 2d 706, 716-17 (1991); Harris v. Reed, 489 U.S. 255, n.10 & 13, & 264-66, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989); Evans v. Dowd, 932 F.2d 739, 741 (8th Cir.) (per curiam), cert. denied, ___ US. ___, 112 S. Ct. 385, 116 L. Ed. 2d 335 (1991). "[A] federal claimant's procedural default precludes federal habeas review, like direct review, only if the last state court rendering a judgment in the case rests its judgment on the procedural default." Harris, 489 U.S. at 262-63. The Missouri Supreme Court's decision did rely on procedural default and found that the only claims not procedurally barred are those involving specific allegations of ineffective trial counsel. Antwine, 791 S.W.2d at 406.

(1991); Harris v. Reed, 489 U.S. 255, n.10 & 13 & 264-66, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989); Evans v. Dowd, 932 F.2d 739, 741 (8th Cir.) (per curiam), cert. denied, ___ U.S. ___, 112 S. Ct. 385, 116 L. Ed. 2d 335 (1991).

1. **Adequate Cause and Actual Prejudice**

By failing to raise claims other than specific allegations of trial counsel ineffectiveness in the 29.15 Motion for Post-Conviction Relief, petitioner has defaulted his available state remedies. Smith v. Murry, 477 U.S. 527, 532-33, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986); Gilmore v. Delo, 908 F.2d 385, 387 (8th Cir.), cert. denied, 497 U.S. 1049, 111 S. Ct. 20, 111 L. Ed. 2d 833 (1990). This Court cannot provide federal habeas corpus relief based on an allegation which petitioner has procedurally defaulted on unless petitioner has adequate cause and actual prejudice for his procedural default. Coleman v. Thompson, 501 U.S. ___, 111 S. Ct. 2546, 115 L. Ed. 2d 540, 669 (1991); Wainwright v. Sykes, 433 U.S. 72, 90-91, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977). Thus, the Court does not have jurisdiction to determine the merits of issues that are procedurally barred unless petitioner does meet the adequate cause and actual prejudice test. Coleman, 115 L. Ed. 2d at 655.

Petitioner argues that he is not procedurally barred because his direct appeal and post-conviction counsel were ineffective and thus, he meets the adequate cause and actual prejudice test. For ineffective assistance of counsel to constitute cause, petitioner must first, show that counsel's representation fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 688, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To show that counsel's representation fell below an objective standard of reasonableness, petitioner must overcome a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance; the Court must be highly deferential when reviewing counsel's performance. Id. at 689. Second petitioner must show that "but for

counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

Petitioner contends that many allegations were not raised in his post-conviction appeal because his counsel failed to raise them within the time permitted by Supreme Court Rule 29.15. However, the mere failure to raise certain claims on appeal does not mean that counsel's representation fell below the standard of reasonableness. The United States Supreme Court holds: "There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." Coleman, 115 L. Ed. 2d at 671. It was petitioner's post-conviction counsel who untimely filed the Second through Sixth Amended Rule 29.15 Motions for Post-Conviction Relief, but this error cannot be constitutionally ineffective. Petitioner "must bear the risk of attorney error that results in a procedural default." Id.

Petitioner's argument that Rule 29.15 is a procedure that is unique only to Missouri and similar to the procedure described in Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 82 (1985), is without merit. While Missouri law may provide various avenues of relief after denial of direct appeal or provide counsel for post-conviction relief, federal law does not require such avenues of relief. No matter how petitioner characterizes or packages Rule 29.15, it is still an avenue to obtain post-conviction relief; the Constitution is not violated when post-conviction counsel is ineffective. In the present case, petitioner has had a direct appeal. See, Antwine, 743 S.W.2d at 51. The Court also notes that although the Missouri Supreme Court did not consider petitioner's Second through Sixth Amendment

Motions for Post-Conviction Relief under Rule 29.15, it did accept petitioner's first amended motion.

2. **Clearly Announced Procedural Rule**

Petitioner argues that the Missouri Supreme Court retroactively imposed a procedural rule which was not clearly announced. The Court notes that the United States Supreme Court and the eighth circuit hold that if a procedural rule is not regularly followed or firmly established, the procedural rule is not an adequate and independent state bar. O'Dell v. Thompson, ___ U.S. ___, 112 S. Ct. 618, 116 L. Ed. 2d 639, 642 (1991); Ford v. Georgia, 498 U.S. 411, 111 S. Ct. 850, 112 L. Ed. 2d 935, 949-50 (1991); James v. Kentucky, 466 U.S. 341, 348-49, 104 S. Ct. 1830, 80 L. Ed. 2d 346 (1984); Williams v. Lockhart, 873 F.2d 1129, 1131-32 (8th Cir.), cert. denied, 493 U.S. 942, 110 S. Ct. 344, 107 L. Ed. 2d 333 (1989).

Petitioner filed his pro se motion on June 7, 1988 and his appointed attorney filed an entry of appearance on the same day. Petitioner's counsel filed the first amended motion on August 12, 1988, sixty-six days after his entry of appearance. The second through the sixth amended motions were filed on November 7, 16, 21, 23 and 30 respectively. The motion court accepted petitioner's six amended motions and denied petitioner relief on the merits. Rule 29.15 provides that "[a]ny amended motion shall be verified by movant and shall be filed within thirty days of the date counsel is appointed or the entry of appearance by counsel that is not appointed. The court may extend the time for filing the amended motion for one additional period not to exceed thirty days." The Missouri Supreme Court held that the second through the sixth amended motions were

procedurally barred because they were untimely filed, but accepted the first amended motion even though it was filed six days late. Antwine, 791 S.W.2d at 406.

There is some cause for concern for applying the Rule 29.15 time limits as a procedural bar in the present case. Petitioner filed his pro se motion on June 7, 1988. On January 1, 1988, Rule 29.15 became effective,[3] replacing Rule 27.26. Unlike Rule 29.15, Rule 27.26 did not provide any time limits as to when a petitioner had to file for Rule 27.26 relief. Compare, Rule 29.15 (thirty-day time limit with no more than one thirty-day extension) with Rule 27.26 (no time limit provided). See also, Day v. State, 770 S.W.2d 692 (Mo. en banc) (comparing Rule 29.15 with Rule 27.26), cert. denied, 493 U.S. 866, 110 S. Ct. 186, 107 L. Ed. 2d 141 (1989). Because of the lack of time limits, Missouri courts experienced increasing number of Rule 27.26 filings and large backlogs. Some of the cases were filed many years after conviction. Id. To remedy this problem, Rule 29.15 replaced Rule 27.26 and provided for specific time limits in which to file a petition. Thus, roughly six months prior to petitioner's filing of his Rule 29.15 petition, Missouri did not have a clearly established time limit. Six months, however, is sufficient notice to petitioner that he must meet specific time limits.

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[3]Rule 29.15 applies to all proceedings where a petitioner is sentenced on or after January 1, 1988. Petitioner was sentenced to die on August 30, 1985, but Rule 29.15 also states that "if sentence is pronounced prior to January 1, 1988, and no prior motion has been filed pursuant to Rule 27.26, a motion under this Rule 29.15 may be filed on or before June 30, 1988." Rule 29.15(m).

Chief Justice Blackmar of the Missouri Supreme Court concurred with the majority's decision that petitioner does not have any grounds for relief, but was concerned that the time limits were not clearly established.

> I can understand the desire to have the issues fixed in a reasonable time, but can also understand the trial court's apparent assumption that amendments would be allowed in 29.15 proceedings on the model of amendments in civil actions generally, with the doctrine of relation back.
>
> This opinion and other recent opinions solve the problem for the future, and movants and counsel now know what they must do to avoid procedural default. But the requirements were not so clear when the trial court acted in this case, and so I would place the affirmance on the merits of all issues submitted to and disposed of by the trial court.

Antwine, 791 S.W.2d at 412. A majority on the Missouri Supreme Court disagreed with Chief Justice Blackmar; this Court agrees with the majority. Facially, Rule 29.15 is clear that the time limits are mandatory and Missouri case law is not to the contrary. The Missouri courts have consistently held that petitions untimely filed are procedurally barred under Rule 29.15 except when there is an unsettled interpretation of Rule 29.15. The cases in which the requirements of the statute were not clear involve different interpretations as to when the time limits begin and end

running. See e.g., Schneider v. State, 787 S.W.2d 718, 720 (Mo. en banc) (No procedural bar because it was not clear whether the initial thirty day time limit began to run on the date of appointment of counsel or the date counsel makes his appearance.), cert. denied, ___ U.S. ___, 111 S. Ct. 231, 112 L. Ed. 2d 186 (1990); Clemmons v. State, 785 S.W.2d 524, 527 (Mo. en banc) (No procedural bar because it was not clear whether petitioner had to file for an extension of time to file an amended motion within the initial thirty days. The amended motion was filed within 60 days of appointment of counsel.), cert. denied, ___ U.S. ___, 111 S. Ct. 229, 112 L. Ed. 2d 183 (1990); Amrine v. State, 785 S.W.2.d 531, 533 (Mo en banc) (Amended petitions are procedurally barred because they were filed over four months after the time limit.), cert. denied, ___ U.S. ___, 111 S. Ct. 227, 112 L. Ed. 2d 181 (1990); Day, 770 S.W.2d at 693-96. (The failure to meet time limits results in a procedural bar.); Sloan v. State, 779 S.W.2d 580, 581-82 (Mo. 1989) (en banc) (same), cert. denied, 494 U.S. 1060, 110 S. Ct. 1537, 108 L. Ed. 2d 776 (1990). The present case does not involve an unsettled interpretation of Rule 29.15. Thus, because Rule 29.15 requires strict adherence to the time limits and the Missouri courts have consistently required strict adherence, the Court finds that Rule 29.15 was a clearly announced procedural rule at the time the Missouri Supreme Court imposed it on petitioner.

3. Exhaustion

Petitioner argues that he has not exhausted all of his state court remedies. He asks the Court to stay proceedings in this Court and to provide him with a reasonable time in which to file a Writ of Habeas Corpus with the Missouri courts under Rule 91. It is true that a federal court cannot

grant an application for a writ of habeas corpus unless the "applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b). The Court must dismiss the entire petition without prejudice when a petition contains both exhausted and unexhausted claims. McCartney v. Vitek, 902 F.2d 616, 617 (8th Cir. 1990).

In the present case, however, petitioner has already attempted to obtain relief under Rule 91. Petitioner filed a Petition for Writ of Habeas Corpus under Rule 91 on January 24, 1991. On January 28, 1991, the Missouri Supreme Court summarily dismissed the petition.

Further, the Court does not need the petitioner to exhaust all claims when "it is clear that the state court would hold the claim procedurally barred." Harris, 489 U.S. at 263 n.9. See also, Schlup v. Armontrout, 941 F.2d 631, 637 (8th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1273, 117 L. Ed. 2d 499 (1992). The present case is just such a case. The Missouri Supreme Court held that all claims except for specific allegations of ineffective assistance of trial counsel are procedurally barred. Antwine, 791 S.W.2d at 406. On January 24, 1991, petitioner filed his Petition for Writ of Habeas Corpus under Rule 91 and four days later, two of which comprised a weekend, and without waiting for a response from the State, the Missouri Supreme Court summarily dismissed the petition on January 28, 1991. Thus, even if there are unexhausted claims, it is not necessary to dismiss the petition before the Court.

III. Merits

A. Ineffective Trial Counsel

Specific allegations of ineffective trial counsel raised in the First Amended Motion for Post-Conviction Relief under 29.15 are not procedurally barred. The Court may review the merits of these allegations, but there is a presumption of correctness as to factual issues. The presumption is not irrebuttable. 28 U.S.C. 2254(d).

The Court cannot reverse either petitioner's conviction or sentence unless petitioner shows first, that counsel's representation fell below an objective standard of reasonableness. Strickland, 466 U.S. at 687-88. To show that counsel's representation fell below an objective standard of reasonableness, petitioner must overcome a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance and was a matter of trial strategy; the Court must be highly deferential when reviewing counsel's performance. Id. at 689. Second, petitioner must show that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

1. **Failure to Develop Mitigating Instructions**

The jury was instructed that they were to consider two statutory mitigating circumstances: petitioner's history of prior criminal activity and his age at the time of the offenses of November 11, 1983. The jury was also instructed to consider any other mitigating evidence. Further, trial counsel, in his closing argument, asked the jury to have mercy on petitioner.

First, petitioner argues that trial counsel should have asked for mitigating instructions that petitioner committed the offenses while under the influence of extreme mental or

emotional disturbance and that petitioner's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. See, Mo. Ann. Stat. §§ 565.012.3(2 & 6). Petitioner also argues that trial counsel should have sought a second medical examination of petitioner after the initial examination did not reveal that petitioner suffered from any mental or emotional problems at the time of the offenses.

The decision not to argue for the two mitigating instructions was a matter of reasonable trial strategy. Petitioner had earlier turned down a plea bargain and sought a full acquittal, thus trial counsel used self-defense and other theories that would acquit petitioner. Pursuing a strategy of emotional or mental disturbance would not only be inconsistent with full acquittal because it would only reduce petitioner's sentence, Penry v. Lynaugh, 492 U.S. 302, 338-40, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (Execution of one with mental or emotional problems does not violate the Eighth Amendment), but also with the self-defense theories that trial counsel presented at the guilt phase. Further, the initial examination of petitioner was conducted four months after the offense and did not reveal any mental or emotional problems. Instead, the medical report stated petitioner's behavior indicated that he had probably taken PCP the day of the offenses. Such circumstances demonstrate that trial counsel's decision not to argue for the two mitigating instructions was sound.

Petitioner argues that the initial examination was flawed. A second examination later indicated that petitioner suffered from mental problems at the time of the offenses, but because the second examination occurred more than four years after the offenses, the motion court found that it did not

credibly demonstrate what petitioner's mental condition was at the time of the offenses. The evidence in the record does not overcome the presumption of correctness. 28 U.S.C. § 2254(d). The decision not to argue for the two mitigating instructions and not to order a second mental evaluation of petitioner does not violate petitioner's constitutional rights.

Petitioner argues that trial counsel should have requested mitigating instructions that: (1) petitioner had a good employment history; (2) had no juvenile record and no history of violent behavior and (3) he was a good father.[4] Part of petitioner's employment history was as a drug dealer and petitioner's criminal record included a prior conviction for which petitioner was placed on probation, thus the decision not to ask for these mitigating instructions was a matter of sound trial strategy. Trial counsel had already introduced evidence as to petitioner's children and petitioner testified as to his close relationship with them. Thus, trial counsel did present evidence that petitioner was a good father and because the jury was instructed that they could consider

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[4]Petitioner, in his 29.15 appeal argued that trial counsel should have requested a mitigating jury instruction that he peacefully served his pretrial detention. This Court finds no mention of this argument in either petitioner's First Amended Brief or in his Traverse, thus it is not necessary for the Court to address the issue. Assuming that the argument is generally raised within the 289 pages of briefs that petitioner submits to the Court, the Court finds that the decision not to ask for the instruction was a matter of sound trial strategy because petitioner not only had killed one person while in police custody, but also was involved in a fight while in pretrial detention.

all evidence in mitigation, the jury could properly consider this as a mitigating circumstance.

Petitioner argues that trial counsel should have presented a mitigating instruction based on George Jones's threats to petitioner and his family. Trial counsel attempted to convince the jury at the guilt phase that petitioner acted in self-defense to protect himself and his family when he killed George Jones, but there was insufficient evidence for such a defense. The Court agrees that to ask for the mitigating instruction even though the self-defense theory was rejected at the guilt phase, would have undermined trial counsel's credibility with the jury.[5]

Lastly, petitioner argues that trial counsel should have requested a mitigating instruction that petitioner had asked that he not be put in the same police wagon or jail cell as George Jones. Trial counsel's failure to present such evidence was a matter of reasonable trial strategy. To obtain evidence that petitioner had asked that he not be put in the same police wagon or jail cell as George Jones, trial counsel would have had to question the police officers involved. The officers's testimony could have been damaging to petitioner's

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[5]As in footnote 4, the Court does not find any mention of the argument that George Winston's participation should be considered a mitigating circumstance. If petitioner did generally raise the issue, the Court holds that the decision not to ask for the mitigating instruction was a matter of sound trial strategy. Such an instruction would be contrary to the jury's finding at the guilt stage rejecting petitioner's self-defense theories and thus undermine trial counsel's credibility with the jury.

case if they testified that petitioner eventually agreed to go with George Jones in the same police wagon or jail cell.

B. Failure to Object to Statements

The State, at the penalty phase argued:

> Why should you and I, as lawful, working citizens of this community, work the rest of our natural lives just so Calvert Antwine can live in the penitentiary for the rest of his natural life or at least until he's served 50 years in prison?
>
> ****
>
> And isn't it much more humane to sentence this man to death so that his brother can get on with his life, and so that the two children can get on with their lives, instead of having to think, every day for the next 50 years, they have a brother or a father locked up in the penitentiary. Ladies and gentlemen, I submit to you that there is only one verdict you can return as to Count II, and that is a verdict of death.

The State also argued that if the jury imposed the death sentence, petitioner would "be put to death instantaneously." Petitioner argues that this seeks to minimize the penalty of death contra Caldwell v. Mississippi, 472 U.S. 320, 328-29, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1986) ("[I]t is impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the

responsibility for determining the appropriateness of the defendant's death rests elsewhere."). Petitioner argues and Chief Justice Blackmar agrees that the State made these arguments to inflame the jury. Antwine, 743 S.W.2d at 74. This Court agrees that these arguments have "no place in an American courtroom," but like the majority of the Missouri Supreme Court, disagrees that the case should be remanded for re-trial of the penalty phase. Trial counsel testified that he did not object to the State's arguments because he thought that the State's arguments would "make the jury angry and 'do more damage than good' to the State." Antwine, 791 S.W.2d at 410. The Court agrees that the decision not to object to these questions was a matter of reasonable trial strategy.

Petitioner argues that trial counsel should have objected to the State's argument that:

> it is a far more humane execution than this man provided Eric [George] Jones . . . . This man believes in capital punishment . . . in the death penalty . . . in execution without a trial by judge and jury . . . in execution without a victim being represented by an attorney . . . in taking the law into his own hands, not only on the streets but when he's confined.

Petitioner argues that the State's argument implies to the jury that he does not have a right to a trial and should be dealt with accordingly in violation of Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). The Court finds that the State did not violate petitioner's right to remain silent or his right to a fair jury trial and agrees with the Missouri Supreme Court that the State's argument

emphasizes the seriousness of the crime and his disregard for the law.

Petitioner contends that trial counsel was ineffective because he did not object when the State stated that "[a] jury in Jackson County one day is going to come back with the death penalty in a capital murder case. That day is goin_ to be a day when . . . a defendant has proven so clearly to 12 people that he will never be rehabilitated . . . . " Petitioner states that there was no evidence that he could not be rehabilitated. Based on the circumstances of the murder of both Winston and George Jones, there was sufficient evidence for the jury to conclude that petitioner could not be rehabilitated and thus, the State's statement was admissible and an objection would properly be overruled.

Petitioner argues that trial counsel should have objected when the State said, "We are asking you to recommend a sentence of death on Count II." Given that the State had earlier told the jury that it was responsible for sentencing, the statement that the jury would only "recommend" whether petitioner would die does not minimize the jury's responsibility as the trial judge had in Caldwell.

Petitioner's final argument is that the cumulative affect [sic] of the State's arguments was to inflame the jury into imposing a sentence of death. The Court agrees with the trial court and the Missouri Supreme Court that "[d]efendant has failed to demonstrate that [these] arguments deprived him of a fair trial." Antwine, 791 S.W.2d at 411.

C. Merits of Issues Procedurally Barred

Assuming the untimely filing of Rule 29.15 petitions is not a procedural bar, the Court finds that petitioner's allegations are without merit. The Court recognizes the finality and irreversibility of a death sentence once it is carried out thus, for the past month the Court has examined with great care the merits of all issues that petitioner alleges and finds that they are without merit.

IV. Conclusion

Today, habeas corpus law is a morass of contradictions and ambiguity that together defy common sense. Throughout the murkiness, this Court has attempted to maintain a sense of fairness and justice. The goals of efficiency and federalism must always be placed in perspective when involving the life of a fellow human being. "Nothing could be more contrary to contemporary standards of decency or more shocking to the conscience than to execute a person who is actually innocent." Herrera v. Collins, 61 U.S.L.W. 4108, 4119, 122 L. Ed. 2d 203 (1993) (J., Blackmun, dissenting) (citations omitted).

The Court is satisfied that in this case, petitioner's United States Constitutional rights were not violated. It is therefore

ORDERED that petitioner's First Amended Petition for Writ of Habeas Corpus is DENIED.

Dean Whipple
DEAN WHIPPLE
UNITED STATES DISTRICT JUDGE

DATED: Mar. 4, 1993.

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. 67720
	)	
CALVERT LEON ANTWINE,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI
Honorable William Ely, Judge

Appellant, Calvert Leon Antwine, was charged by indictment on February 1, 1985, with two counts of capital murder, two counts of armed criminal action[1] and one count of first-degree robbery. The case proceeded to trial before a jury in the Circuit Court of Jackson County on August 22, 1985. Appellant was convicted of first-degree robbery,[2] second-degree murder[3] and capital murder,[4] for which he was

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[1]The two counts of armed criminal action were subsequently dismissed by the State.

[2]§ 569.020, RSMo 1978.

[3]§ 565.004, RSMo 1978.

sentenced to thirty years imprisonment, life imprisonment, and death, respectively. Appellant appeals from his conviction and sentence.

Because the trial court imposed a sentence of death, this Court is vested with exclusive appellate jurisdiction. Mo. Const. art V, § 3. We affirm both he judgment and the sentence.

I.

At approximately 6:00 p.m. on November 11, 1983, appellant arrived at 2108 Vine Street where several men were refurbishing a restaurant for the owner, Eric George Jones ("George"). Appellant, who was known by the workers, asked where George Jones or his brother, Winston, could be found. When the workers, who were involved in a crap game, appeared to ignore appellant, appellant decided to "bust up" the crap game. He produced a handgun and announced, 'This is a stick up." After firing several shots into the wall and hitting a space heater, appellant took money from the workers and left the restaurant.

From the restaurant, appellant immediately proceeded to the Lincoln Garden Apartments, located a block away from the restaurant. There he encountered Joy Jones, the sister of George and Winston Jones, who was leaving the apartment she shared with Winston. Joy was several yards from the doorway to her apartment when she saw appellant approaching. When she asked him what he wanted, appellant indicated that he was looking for George and Winston. When Joy asked what he wanted with her brothers, appellant

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[4]§ 565.001, RSMo 1978.

said he was going to kill them. Appellant proceeded to the doorway where he demanded that Winston open the door. Winston cracked open the door, whereupon appellant forced his way in. As the apartment door closed, Joy ran to the restaurant to look for George.

Shirley Ford and her daughter, LaTanya, lived in an adjacent apartment. They observed appellant forcing his way into Joy's apartment, saw that he was carrying a gun, and heard appellant yell, "I'm going to kill all of you mother_____." After appellant entered the apartment, Shirley and LaTanya heard shots. Shirley called the police. She observed appellant leaving the apartment carrying a gun and a black bag. Appellant entered a gold and black car and drove away.

Police officers later found Winston Jones lying face down on the living room floor of the apartment with three gunshot wounds in his head. At trial, the medical examiner testified that two of the wounds were caused by a weapon fired while flush against the skin. Other items found in the apartment included a large quantity of marijuana and twelve hundred dollars in cash.

After leaving Joy's apartment, appellant proceeded to a house at 26th and College from which the Jones brothers operated a drug business. While appellant was there, George Jones arrived with Joy and two others. George knocked on the door where he was met by appellant with a gun in his hand. George turned and fled. Appellant gave chase and caught him. Joy heard appellant say, "I just killed your brother and I'm going to kill you too." Appellant directed George at gun point back to the car and forced George to drive.

Sometime between 6:00 and 7:00 p.m., two police officers were separately dispatched to the intersection of 34th and Prospect on a disturbance call. Upon arrival, the officers observed appellant and George struggling in the middle of the street over the possession of a handgun. The officers approached, secured the gun and broke the two men apart. Both appellant and George were placed under arrest, handcuffed behind the back and put into a paddy wagon for transport to the police station. While in the paddy wagon, appellant stepped through his arms so that his hands were in front of his body.

Upon arrival at the station, Officer Schilling, the paddy wagon driver, placed George and appellant in a holding cell. Approximately five to ten minutes later, Officer Schilling heard a scream coming from the holding cell and ran back to investigate. He and another officer, Detective Lonkansky, entered the cell and found George lying face down on the floor, semiconscious and bleeding from the nose and mouth. Appellant was seated on a bench three to four feet away.

Officer Schilling left the cell to call an ambulance. Realizing that he was wearing his service revolver, Detective Lonkansky called for assistance and stepped out of the cell. He had walked approximately four feet when he heard a loud thumping sound. Turning, he saw appellant in midair, coming down with both feet on the side of George's head. Detective Lonkansky again shouted for assistance. Appellant sat back down on the cell bench, picked up a rag off the floor and calmly proceeded to wipe the blood off of his shoes. The medical examiner testified that George Jones died as a result of a blunt force injury to the head, and that

such injury was consistent with being kicked, stomped or beaten against a concrete floor.

Appellant contended that he killed the Jones brothers in self-defense. More specifically, appellant urged the jury to believe that he wanted out of the drug business, in which he was engaged with the Joneses, and that the Joneses threatened to kill him if he carried out his intention to quit.

The jury found appellant guilty of capital murder for the killing of George Jones, guilty of second-degree murder for the killing of Winston Jones, and guilty of second-degree robbery. In the punishment phase of trial, the jury imposed a sentence of life imprisonment for second-degree murder, thirty years imprisonment for first-degree robbery, and death for capital murder. On appeal, appellant raises twenty-two points of error. We have reviewed all of appellant's points with great care. Only meritorious points will be discussed.

II.

We first consider appellant's argument that the two counts of capital murder and one count of first-degree robbery were improperly joined. Prior to trial, defense counsel filed a motion to sever Counts I and II (charging capital murder of Winston Jones and armed criminal action) from Count III (charging capital murder of George Jones), and to sever Counts IV and V (charging robbery and armed criminal action) from Counts I, II and III. The motion was denied.

Appellant contends that § 540.140.2, RSMo Cum. Supp. 1984 (effective August 13, 1984), does not apply in this case, that the charges against him were improperly joined

under Rule 23.05 because his offenses were separate and distinct transactions, and alternatively, that the trial court abused its discretion under Rule 24.07 by refusing to sever the offenses for trial. Appellant further asserts that the trial court erred in submitting the punishment for robbery to the jury during the punishment phase of the trial.

A.

Initially, appellant asserts that § 545.149.2 is not applicable to this case. Instead, appellant argues that the joinder issue should be decided under Rule 23.05.[5] Under Rule 23.05, the propriety of joining two or more offenses in the same indictment or information depends up on the existence of a "common scheme or plan."

"[T]he essential test in determining whether a common scheme or plan exists, . . . is the requirement that all the offenses charged must be 'products of a single or continuing motive.'" (emphasis in original), **State v. McCrary**, 621 S.W.2d 266, 271 (Mo. banc 1981); **State v. Foerstel**, 674 S.W.2d 583, 589 (Mo. App. 1984). For the reasons which follow, we need not determine whether § 545.140.2 applies in this case.

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[5]Rule 23.05 states that:

All offenses that are based on the same act or on two or more acts that are part of the same transaction or on two or more acts or transactions that constitute parts of a common scheme or plan may be charged in the same indictment or information in separate counts.

We believe that the offenses charged against appellant were the product of his continuing motive to kill George and Winston Jones. After appellant arrived at the restaurant, his first act was to ask the workers there whether they had seen George or Winston. When the men ignored his question, appellant decided to get their attention; he robbed them. He then left he restaurant and immediately went to Joy Jones' apartment, continuing the search for George and Winston he began at the restaurant. At the apartment he told Joy Jones that he was looking for her brothers and intended to kill them. Finding Winston at the apartment, appellant shot and killed him. Appellant continued his search for George, proceeding to a house known to him as one location from which the Jones brothers operated a drug business and at which he expected to find George. When George arrived, appellant pursued him at gunpoint, caught him and announced that he had killed Winston and was going to kill him. After the police arrested the two men and placed them in the paddy wagon, appellant maneuvered to place his handcuffs in front of his body. At the holding cell, appellant killed George.

This entire sequence of events took place in less than two hours. Each crime occurred within a short vicinity and short time of the other; all were linked by appellant's continuing motive to find and kill George and Winston Jones. Appellant's argument that these were separate, distinct, unconnected crimes is simply inconsistent with the facts in this case.

We find that each of the offenses were acts constituting parts of a common scheme or plan. All were properly joined under Rule 23.05.

B.

The question of severance of properly joined offenses for trial rests in the discretion of the trial court. **McCrary,** 621 S.W.2d at 272; **State v. Williams,** 603 S.W.2d 562, 567 (Mo. 1980); Rule 24.07. In deciding a motion to sever, the court should determine whether prejudice to the defendant would result from joinder of all offenses in a single trial by considering "the number of offenses charged, the complexity of the evidence to be offered and whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense." **State v. Duren,** 556 S.W.2d 11, 20 (Mo. banc 1977), **rev'd on other grounds sub nom, Duren v. Missouri,** 439 U.S. 357 91979); **McCrary,** 621 S.W.2d at 272; **Forestel,** 674 S.W.2d at 588.

Our review of this record does not reveal any abuse of discretion in the trial court overruling appellant's motion to sever. Only three offenses were charged against appellant. The evidence relevant to each was not overly complex. The jury received separate instructions on each count. The court submitted an instruction patterned after MAI-CR2d 2.70, limiting consideration of the evidence to each count.[6] The

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[6]Instruction No. 16 submitted by the court read:

The defendant is charged with a separate offense in each Count submitted to you. Each offense and the evidence and law applicable to it should be considered separately. Any evidence which was or has been limited to one of the offenses charged or one purpose should not be considered by you as to another offense charged for any purpose.

You may find the defendant guilty or not guilty on any or all of the Counts submitted against him.

fact that the jury found appellant guilty of the lesser included offense of second-degree murder for the death of Winston Jones shows that the jury carefully considered the instructions and applied the law intelligently as to each offense.

No prejudice resulted from the trial court overruling the motion to sever. Appellant's point is denied.

C.

Appellant also contends that the trial court committed instructional error by submitting the punishment for robbery to the jury during the punishment phase of the trial. MAI-CR2d does not specifically deal with the submission of punishment alternatives to the jury. The opening instruction to be given the jury at the second stage of homicide trials states in pertinent part:

> You have found the defendant guilty of (capital murder) (murder in the second degree) (manslaughter). At this stage of the trial it will be your duty to determine within the limits prescribed by law the punishment which must be imposed for that offense.

MAI-CR2d 15.30. During the punishment phase of appellant's trial, the trial court gave three separate opening instructions, the first reflecting the jury's finding of guilt to second-degree murder, the second reflecting a finding a guilt

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You should render a separate verdict as to each Count submitted against the defendant.

to robbery in the first degree,[7] and the third reflecting a finding of guilt to capital murder. Appellant argues that the modification of MAI-CR2d 15.30 to refer to the offense of robbery is not only unauthorized under MAI-CR2d directives[8] but contrary to the statutory procedure regarding punishment[9] as well.

Even assuming error **arguendo**, we find no prejudice to appellant by the modification of MAI-CR2d 15.30. Neither do we find prejudice in submitting the penalty for robbery during the punishment phase of trial. The burden is on appellant to show prejudice; he has not done so. On this record there is no evidence that the jury was in any way confused by submission of the robbery count and the

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[7]The instruction read:

You have found the defendant guilty under Count III of Robbery in the First Degree. At this stage of the trial it will be your duty to determine within the limits prescribed by law the punishment which must be imposed for that offense.

The punishment by law for Robbery in the First Degree is life imprisonment or imprisonment for a term of years fixed by you, but not less than ten years and not to exceed thirty years.

[8]See Instructions for Use, MAI-CR2d Volume I, p. XV, XVI.

[9]§ 557.036, RSMo Cum. Supp. 1984, applicable to the robbery count, provides that the court shall instruct the jury as to the range of punishment authorized by statute and upon a finding of guilt to assess and declare the punishment as part of their verdict. See MAI-CR2d 23.02.

homicide counts because of the penalties involved. The instructions were given separately and the penalties imposed by the jury were neither inconsistent with the law nor excessive under the circumstances. Finding no prejudice, we deny the point.

III.

Appellant next raises several points of error focusing on the jury selection process.

A.

Appellant first objects to the detail with which the state was allowed to present the facts of the case on voir dire.

A defendant has the right to an impartial jury -- a jury which decides the case on the evidence presented at trial, not on information gleaned from some external source. U. S. Const. Amend. VI; **Irvin v. Dowd,** 366 U.S. 717 (1961); **Sheppard v. Maxwell,** 384 U.S. 333 (1966). In order to protect this right, the Court and the parties must determine a prospective juror's personal knowledge of the crime or his exposure to pretrial publicity. Revelation of some portion of the facts of a case on voir dire is necessary to make this determination. An insufficient description of the facts jeopardizes appellant's right to an impartial jury.

We do not permit counsel, however, to try the case on voir dire by a presentation of the facts in explicit detail. **State v. Wilkerson,** 616 S.W.2d 829, 834 (Mo. banc 1981). Nor is voir dire an appropriate occasion for argument. **State v. Henderson,** 547 S.W.2d 141, 143 (Mo. App. 1976).

A balance must be struck. The trial judge is in the best position to determine whether a disclosure of facts on voir dire is sufficient to assure the defendant of an impartial jury without, at the same time, being tantamount to a presentation of evidence. The discretion of the trial judge in striking this difficult balance will be upheld, absent abuse.

Appellant urges that the trial judge abused his discretion. We disagree. The party asserting abuse of the trial court's discretion in controlling the manner and extent of questioning on voir dire has the burden of demonstrating "a real probability that he was thereby prejudiced." **State v. Norton**, 681 S.W.2d 497, 498 (Mo. App. 1984). In reviewing the record in this case, we find that the factual presentation given by the State was neither too lengthy nor overly detailed. Appellant fails to identify any statements by the State that were either argumentative or prejudicial in the context in which they were made. There being no prejudice to appellant, the point is denied.

B.

Appellant's more significant contention regarding the State's factual presentation on voir dire concerns the subsequent death-qualification of the prospective jurors. He argues that the manner in which the State conducted the death-qualification process predisposed the jury to vote for the death penalty in violation of due process and right to a trial by a fair and impartial jury.

After the facts were presented and questioning was had of several venirepersons who indicated their familiarity with the case, the State proceeded as follows:

MR. DAKOPOLOS: Now, in this state, the law is that should a person be found guilty of capital murder, there are only two sentences that can be imposed on a defendant. One is life imprisonment with no possibility of probation or parole until he has served a minimum of 50 years in the Missouri Division of Corrections. The other is death.

Is there anyone on the panel, because of personal, moral or religious reasons, who, because of those reasons, would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of this case before you? If I could see a show of hands on that. Did everyone understand my question?

Anyone here in the jury box that would automatically vote against the imposition of the capital punishment, irregardless [sic] of the circumstances of the case? How about back there? Yes ma'am?

VENIREPERSON MARCY BROWN: I don't know if I was included back there or not. I think I might, yes.

MR. DAKOPOLOS: We'll come back to you later. I just want a show of hands at this time. Anyone else?

> My next question, is there anyone on the panel whose attitude toward the death penalty would prevent them from making a fair and impartial decision as to this defendant's guilt? Any hands on that?

After a show of hands, the State was permitted over objection to ask an additional question:

> MR. DAKOPOLOS: Now, the reason I asked these two previous questions about the imposition of the death penalty is that in the event the jury is ultimately selected and should find this defendant guilty of capital murder, the State will, in fact, be asking that the jury impose the death penalty.
>
> Now, other than the hands that I've already seen, does that cause anyone else to change their mind in that regard?

The State may not hypothesize a set of facts and then ask the prospective jurors how they would vote under those facts. **State v. Pinkston,** 79 S.W.2d 1046, 1048-49 (Mo. 1935). Appellant argues that the State's initial factual presentation, when coupled with advisement to the jury during the death-qualification process that it would be asking for the death penalty should the jury "find this defendant guilty of capital murder," achieved this forbidden result. We disagree.

In support of his argument that the State may not question veniremen about their ability to impose the death penalty in the case before them, appellant relies on

Witherspoon v. Illinois, 391 U.S. 510 (1968), **Adams v. Texas**, 448 U.S. 38 (1980) and **Wainwright v. Witt**, 469 U.S. 412 (1985). Contrary to appellant's assertion, these decisions point to the conclusion that disclosure of a certain amount of factual information is necessary to determine whether veniremen will act fairly and impartially in the case at hand.

In **Witherspoon**, the Supreme Court noted that while a prospective juror cannot be expected to say in advance of trial whether he would vote for the death penalty in the case before him, he must "be willing to **consider** all of the penalties provided by state law, and . . . not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." 391 U.S. at 522 n.21 (emphasis in original). In **Adams**, the Court simplified the two-part **Witherspoon** test for juror exclusion[10] to one which seeks to determine whether the juror's views about capital punishment "would prevent or substantially impair the performance of his duties . . . in

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[10]Under the **Witherspoon** standard, jurors were properly excluded for cause if they made it

> unmistakably clear (1) that they would **automatically**vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to thedefendant's **guilt.**

391 U.S. at 522-23 n.21 (emphasis in original).

accordance with his instructions and his oath." 448 U.S. at 45. This test was later affirmed in **Wainwright,** where the Court stated that as with any other trial situation where a party seeks to exclude a biased juror, "it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." 469 U.S. at 423.

In **State v. Johns,** 679 S.W.2d 253 (Mo. banc 1984), this Court concluded that a venireman who was unequivocally opposed to the death penalty in that case but who stated that she might be willing to consider it in some cases was not immune from exclusion. Jurors must be able to apply the law fairly and impartially to the facts they will learn at trial. "If she knows enough about the case to know that she could not consider imposition of the death penalty regardless of what evidence might be presented, she must be excused." 679 S.W.2d at 265, **quoting Williams v. Maggio,** 679 F.2d 381, 386 (5th Cir. 1982), **cert. denied,** 463 U.S. 1214 (1983).

The very purpose of voir dire is to examine prospective jurors to discover their state of mind. From that examination it is possible to determine which persons harbor bias or prejudice against either party which would make them unfit to serve as jurors in the case before them. In a capital murder case, inquiry into the venire members' views about the death penalty is of critical importance to the state, the defendant and the court. It is the duty of all concerned to investigate those views thoroughly in order to assemble the most qualified jury. **See State v. Smith,** 649 S.W.2d 417, 428 (Mo. banc 1983).

It is not outside the realm of possibility for a person who expresses general support of the death penalty to reconsider that position when faced with the prospective of imposing that penalty personally. The State's initial reference to the facts and inquiry as to whether the prospective jurors could impose the death penalty in the case before them was not a request for commitment, but a proper investigation into whether the prospective jurors could consider all penalties, including death, regardless of the facts and circumstances later adduced at trial.

C.

Appellant further argues that certain members of the venire who expressed opposition to the death penalty were erroneously removed for cause. The trial court possesses considerable discretion in ruling on challenges to members of the venire for cause. Absent a clear abuse of discretion, the trial court's rulings will not be disturbed on appeal. **Smith,** 649 S.W.2d at 422. **See State v. Battle,** 661 S.W.2d 487, 491 (Mo. banc 1983), **cert. denied,** 466 U.S. 993 (1984); **State v. Stokes,** 638 S.W.2d 715, 721 (Mo. banc 1982), **cert. denied,** 460 U.S. 1017 (1983).

1.

The first two members of the venire excluded for cause were Patricia Briggs and Grover Garrett. Each was questioned individually in chambers after responding to the general inquiries regarding the death penalty asked of the entire panel. Both initially stated that they would be unable to consider imposing the death penalty regardless of the facts and circumstances adduced at trial. In his attempt to

rehabilitate Ms. Briggs, the defense counsel presented her with the following hypothetical fact situation:

> MR. BROWN: Are you saying that if you were presented with a set of facts where, say for instance, a small child was brutally murdered and you were on the jury and you found the person was guilty of capital murder, you're saying that in a situation like that, you could consider the death penalty?
>
> VENIREPERSON BRIGGS: I'm just saying maybe. I couldn't say yes. I still couldn't say yes. I just –
>
> MR. BROWN: I'm not asking if you could, in fact, go on and do it, but could you consider doing it?
>
> VENIREPERSON BRIGGS: Yes, I could consider it.

Similarly, after Mr. Garrett responded positively to the State's questions about whether his attitude toward the death penalty would make it impossible for him to render a fair and impartial decision, the defense counsel asked: "If, for instance, if you were on the jury and you found Adolf Hitler guilty of capital murder, could you consider it in that situation?" In answer to this hypothetical situation, Mr. Garrett hesitatingly responded: "I – I believe so."

In **Wainwright**, the Supreme Court observed that:

> [I]n addition to dispensing with **Witherspoon's** reference to "automatic" decisionmaking, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because determination of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear" . . . . Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

469 U.S. at 424-26. We have consistently recognized the trial judge's superior position to interpret and evaluate the totality of a venireman's verbal and nonverbal responses when actually heard and seen -- an evaluation which cannot be readily made from a cold record. **Smith**, 649 S.W.2d at 422.

Both Briggs and Garrett initially expressed unequivocal opposition to imposing the death penalty in the case before them. The fact that each indicated a willingness to consider the death penalty in the extreme hypothetical situation presented by the defense counsel is not a basis for rendering either of them immune from exclusion from the jury for cause. **Johns**, 679 S.W.2d at 264-65.

Appellant also challenges the exclusion of venireman Anna May, who expressed her position during individual questioning as follows:

> MR. DAKOPOLOS: A personal belief. And because of this personal belief, would you find it impossible to listen to the evidence and render a fair and impartial verdict in the case because of this belief against the death penalty?
>
> VENIREPERSON MAY: I think I might, yes.
>
> MR. DAKOPOLOS: Well, you say you think you might. And, of course, the Court and the attorneys would like as definite a response as you can give us.
>
> VENIREPERSON MAY: I guess I would be.
>
> MR. DAKOPOLOS: And would that be -- would your answer be the same irregardless [sic] of what the facts or circumstances of this case might prove to be during the trial of the case?
>
> VENIREPERSON MAY: Yes.

MR. DAKOPOLOS: And would your answer be the same in any case where the State is seeking a death penalty?

VENIREPERSON MAY: Yes.

MR. DAKOPOLOS: Irregardless [sic] of the facts of this particular case?

VENIREPERSON MAY: Yes, I think it would.

MR. DAKOPOLOS: Any heinous killing of any kind, you still –

VENIREPERSON MAY: Well, when I am involved personally, yes, I think it would. I'd have an awful hard time with it.

MR. DAKOPOLOS: But in any case that you can imagine, your attitude is such that you wold not be able to render a fair and impartial verdict because of your belief against imposing the death penalty; is that correct?

VENIREPERSON MAY: Yes.

The fact that the answers given by May were not unmistakably clear does not render her immune from exclusion. Even from the sterility of the printed page, it is clear that May's answers could well have left the trial judge with the definite impression that her attitude toward the death penalty would prevent her from rendering a fair and impartial

verdict in this case. We find no abuse of discretion in excluding her from the jury.

IV.

Appellant next claims that the trial court erred in giving MAI-CR2d 1.02, 2.20 and 15.38. Appellant urges that these instructions improperly define proof beyond a reasonable doubt as proof which leaves the jury "firmly convinced" of the defendant's guilt.

Effective October 1, 1984, the General Assembly required courts of this state to instruct juries on the definition of reasonable doubt in criminal cases. § 546.070(4), RSMo Cum. Supp. 1984. In compliance with that statutory directive, this Court modified MAI-CR2d 1.02, 2.20 and 15.38 to include the following definition:

> A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. The law does not require proof that overcomes every possible doubt. If, after your consideration of all the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you will find him guilty. If you are not so convinced, you must give him the benefit of the doubt and find him not guilty.

Appellant contends, without citation to any specific supporting authority, that use of the phrase "firmly convinced" lowers the burden of proof required of the state in criminal cases to something less than beyond a reasonable doubt, in violation of appellant's due process. **See In re Winship,** 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt . . . .") We disagree and having fully considered the constitutional mandates regarding burdens of proof, we find no reason to reconsider the definition now.

The "firmly convinced" language contained in the MAI definition is not new. It is substantially the same as that found in the federal instructions,[11] and has been

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[11]The federal definition states in pertinent part:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt . . . . If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you think that there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Federal Judicial Center Committed to Study Criminal Jury Instructions, Pattern Criminal Jury Instruction No.21 (Federal Judicial Center 1982).

employed in federal and state courts alike.[12] It is intended to assist lay jurors in their understanding of the legal phrase "beyond a reasonable doubt." The instruction achieves that purpose; in our view, "firmly convinced" is essentially synonymous with "beyond a reasonable doubt."

Any doubt about the validity of the "firmly convinced" language instruction is removed when it is considered in context. "A single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." **Cupp v. Naughten,** 414 U.S. 141, 146-47 (1973). MAI-CR2d 2.20 informs the jury that "the defendant is presumed to be innocent" and that "the state [bears] the burden of proving beyond a reasonable doubt that the defendant is guilty." Read as a whole, MAI-CR2d 2.20 properly instructs the jurors of their duty in evaluating the evidence and making a determination of guilt or innocence. Appellant's point is denied.

V.

Appellant next argues that the trial court erred in failing to quash the jury panel because the State engaged in a systematic pattern of excluding qualified Black veniremen from the jury in violation of appellant's Fourteenth and Sixth

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[12]**See United States v. Hunt,** 794 F.2d 1095, 1100 (5th Cir. 1986); **United States v. Bustillo,** 789 F.2d 1364, 1368 (9th Cir. 1986). **Accord State v. Clark,** 446 So.2d 293, 299 n.2 (La. 1984).

amendment rights to equal protection and to a jury selected from a fair cross-section of the community.[13]

The United States Supreme Court overruled **Swain v. Alabama,** 380 U.S. 202 (1965), the law governing this issue at the time of trial, in **Batson v. Kentucky,** 476 U.S. ___ (1986). Appellant was tried on August 22, 1985, and sentenced on December 13, 1985. While his case was pending on direct appeal to this Court, the **Batson** decision was rendered on April 30, 1986. In **State v. Lockett,** ___ S.W.2d ___ (No. ____, decided December 16, 1986), this Court determined that **Batson** should not be applied retroactively. **Swain** therefore governs resolution of the issue.

In **Swain,** the Court, in order to preserve the peremptory nature of the prosecutor's challenges and in reliance on the presumption that such challenges are used by the State to obtain a fair and impartial verdict, stated that it could not hold that the striking of blacks in a particular case is a denial of equal protection of the law. 380 U.S. at 221. The Court added, however, that the presumption favoring the prosecutor might be overcome when in a county, case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, no blacks who

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[13]The Sixth Amendment guarantees only that the initial selection of potential jurors be drawn from a fair cross section of the community; it does not apply to the prosecutor's subsequent use of peremptory challenges. **State v. White,** 622 S.W.2d 939, 948 (Mo. banc 1981), **cert. denied** 456 U.S. 963 (1982). We therefore consider only appellant's equal protection argument.

have been selected as part of the venire and survived challenges for cause, have been left on any jury in a criminal case. 380 U.S. at 223. We have adopted this standard in Missouri. **State v. Blair,** 638 S.W.2d 739, 753 (Mo. banc 1982), **cert. denied,** 459 U.S. 1188 (1983); **State v. Baker,** 529 S.W.2d 122, 125 (Mo. banc 1975).

At the hearing on the motion for new trial, four attorneys testified concerning the use of peremptory strikes in seven different criminal trials tried in Jackson County between 1981 and 1982. Without expressing our opinion as to the sufficiency of appellant's proof with regard to the number of trials or time span involved,[14] we find that he has not met his burden to show systematic exclusion even on the evidence presented. Two of the seven cases referred to by appellant each involved two trials. Out of the nine total trials, black persons were left on four juries. Two attorneys from the Jackson County Public Defender's Office further acknowledged that other trials during the time period in question, the prosecutor had not used his peremptory challenges to strike all of the black venirepersons from the jury. Appellant's proof is therefore not sufficient to show the kind of discrimination condemned by **Swain.** His point is overruled.

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[14]In **Swain,** for example, the defendant proved that no black American had sat on a jury in the particular county for a period of fourteen years. 380 U.S. at 226. The defendant in **State v. Davis,** 529 S.W.2d 10, 18 (Mo. App. 1975), compiled statistics covering fifty-two jury panels over a period of one and one-half years.

VI.

Appellant next lodges two challenges to the State's use of his post-arrest silence for purposes of impeachment.

A.

In **United States v. Hale,** 422 U.S. 171 (1975), the Supreme Court exercised its supervisory power over the federal courts and declared that a criminal defendant's silence after receiving warnings required in **Miranda v. Arizona,** 394 U.S. 436 (1966), was sufficiently ambiguous as to have little probative value. In **Doyle v. Ohio,** 426 U.S. 610 (1976), the Supreme Court held that a criminal defendant's due process is violated when the State comments on his silence **after** receiving **Miranda** warnings. The court reasoned that the **Miranda** warnings contain an implicit assurance that a person's silence will not be used against him. **See Colorado v. Connelly,** ___ U.S. ___, 55 U.S.L.W. 4043, 4047 (1986) ("The sole concern of the Fifth Amendment, on which **Miranda** was based is government coercion"). Thus, **Doyle** turned on the criminal defendant's reliance on the implied assurances of the **Miranda** warnings.

Doyle does not apply, however, when a criminal defendant voluntarily speaks after receiving **Miranda** warnings. In such a circumstance, the **Miranda** warnings have not acted as an inducement to remain silent nor is there reliance on the implicit assurance that a person's silence will not be used against him.

In **Anderson v. Charles,** 447 U.S. 404 (1980), defendant Charles made a statement after receiving his **Miranda** warnings. Charles had been arrested while driving

a stolen car. The car belonged to an individual who had been strangled to death in his Ann Arbor, Michigan home less than a week earlier. Circumstantial evidence linked Charles to the murder. After his arrest, and after receiving the **Miranda** warnings, Charles told the police that he had stolen the car in Ann Arbor, approximately two miles from the local bus station. At trial, however, Charles testified that he had stolen the car from a business establishment next door to the bus station. On cross-examination, the prosecutor asked, "Don't you think it's rather odd that if it were the truth [that you had stolen the car next door to the bus station] that you didn't come forward and tell anybody at the time you were arrested, where you got the car?" The Supreme Court held that "**Doyle** does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving **Miranda** warnings has not been induced to remain silent." 447 U.S. at 408.

Similarly, in the absence of the affirmative assurances embodied in the **Miranda** warnings, it does not violate due process for a state to permit cross-examination of a criminal defendant who chooses to take the stand as to his post-arrest silence prior to receiving **Miranda** warnings. "A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony." **Fletcher v. Weir,** 445 U.S. 603, 607 (1982).

B.

Appellant urges that the trial court erred when it permitted the State to cross-examine and impeach him regarding his failure to make an exculpatory statement to the police immediately upon arrest. On cross-examination, the State sought to impeach appellant's testimony that he was looking for George and Winston Jones in order to tell them of his intention to get out of their drug operation, and that after he had shot Winston in self-defense, he decided to turn himself in. The following exchange took place:

Q (By Mr. Dakopolos) And you wanted to clear yourself, and yet there are three police officers there and you don't tell them anything about the robbery at 2108 Vine, about the shooting at the Lincoln Garden Apartments, did you?

A I explained to them that he was a dope dealer –

Q But you didn't tell them anything about the shooting of Winston Jones, did you?

A They didn't ask me.

QBut I thought you wanted to clear yourself and claim that it was self-defense. You had three police officers right there. You didn't say a word about Winston Jones, did you?

A They wasn't really talking to me.

Q I thought you were going to go to the police station and tell them.

A I was going to -- back to the apartment at Lincoln Gardens to find out what happened to George's brother, Winston.

No objection was interposed by defense counsel during this exchange. We review for plain error.

Nothing in the record indicates, nor does appellant allege, that appellant was given **Miranda** warnings immediately upon his arrest at 34th and Prospect. In the absence of the implicit assurances of **Miranda**, appellant was under no inducement to remain silent. **Fletcher** precludes appellant's claim of error on federal constitutional grounds.

Under **Fletcher**, the validity of appellant's claim turns on whether Missouri law permits impeachment with post-arrest, pre-**Miranda** warning silence. Appellant relies on **State v. Mathenia**, 702 S.W.2d 840 (Mo. banc 1984), **cert. denied**, ___ U.S. ___, 106 S.Ct. 3286 (1986), and **State v. Stewart**, 456 S.W.2d 19 (Mo. banc 1970), for the proposition that Missouri law does not permit impeachment with post-arrest silence.

The cases upon which appellant relies each involve a criminal defendant who was given a **Miranda**-type warning. In each case, the prosecutor attempted to make use of post-**Miranda** warning silence. Because no **Miranda** warnings had been given this appellant at the time his silence formed the basis for impeachment, we find the cases upon which appellant relies distinguishable.

Appellant testified that he had decided to turn himself into the police and tell everything he knew about the Jones brothers' drug business. He further testified that he made that decision prior to his encounter with George at the drug house and that only George's arrival and subsequent events prevented him from going to the police station. Given the commitment to this mission which appellant expressed at trial, it is nearly inconceivable that he would have remained silent when the police found him.

> Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. 3A J. Wigmore, Evidence § 1042, p. 1056 (Chadbourn rev. 1970) Each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative.

Fletcher, 455 U.S. at 606. We hold that under Missouri law it is permissible for the State to use a criminal defendant's immediate post-arrest, pre-**Miranda** warning silence for purposes of impeaching his testimony when a natural expectancy of an exculpatory statement exists as a result of a defendant's testimony and defendant's silence is probative of inconsistencies in that testimony.

Because appellant's testimony raised a natural and reasonable expectation that he would have made an exculpatory statement at the time of his arrest, we believe the State's questions regarding appellant's silence at the time of his arrest as to the events of the day were probative of an

inconsistency in his testimony at trial. The trial court committed no error, plain or otherwise, in allowing the impeachment challenged by the appellant.

C.

During closing argument, the State made several remarks over objection concerning appellant's silence following arrest at 34th and Prospect and prior to appellant receiving **Miranda** warnings. Initially, we reaffirm settled law that the trial court possesses broad discretion in controlling closing argument. **State v. McDonald,** 661 S.W.2d 497, 506 (Mo. banc 1984), **cert. denied,** 105 S.Ct. 1875 (1985); **State v. Gilbert,** 636 S.W.2d 940, 943 (Mo. banc 1982). The court's discretion in allowing or rejecting argument of counsel is reversible only when there is an abuse of discretion where the argument is plainly unwarranted. **State v. Armbruster,** 641 S.W.2d 763, 766 (Mo. 1982). Appellant's challenge to the closing remarks of the prosecutor regarding his silence following arrest but before receiving **Miranda** warnings fails for the reasons stated in VI, B, **supra.**

D.

Appellant argues that the trial court erred in permitting the State to cross-examine him concerning his testimony that certain portions of his post-arrest, post-**Miranda** statement were inaccurately transcribed, and his failure to inform the police of the inaccuracies.

After inflicting George Jones' mortal wounds in the holding cell, appellant was taken to an interview room and given **Miranda** warnings. After signing a written waiver of

his right to remain silent and to the presence of counsel, appellant gave his statement to Detective Clarence E. Gibson. The statement was transcribed and subsequently read into evidence by Gibson at trial as part of the State's case in chief.

As trial, defendant chose to testify in his own behalf. On direct examination, appellant testified to an exculpatory version of events inconsistent with the written statement read by Detective Gibson. Under cross-examination, appellant testified that portions of the statement transcribed by Detective Gibson were incorrect. The prosecutor asked, "Well, have you ever told anybody that they weren't true and correct?" Appellant responded that he had told his attorney of the alleged inaccuracies after he had received a copy of the statement approximately one year before trial. Thereafter, the prosecutor commented on the fact that neither appellant nor his attorney had informed anyone prior to trial that the statement previously taken by Detective Gibson was inaccurate. Appellant relies on **Doyle**, 426 U.S. 610, for the proposition that this exchange is an unconstitutional use of post-arrest silence in violation of his Fifth Amendment rights. We disagree.

This case does not involve a defendant who maintained silence after receipt of governmental assurances. Instead, appellant voluntarily chose to give a statement after his arrest, later testified at trial that the statement was inaccurately transcribed, and gave a version of events different from that contained in the statement. Because a defendant "who voluntarily speaks after receiving **Miranda** warnings has not been induced to remain silent," he may be impeached with prior inconsistent statements. **Anderson**, 447 U.S. at 408; **State v. Van Doren**, 657 S.W.2d 708, 715-

16 (Mo. App. 1983). Similarly, having elected to make a statement to the police, a defendant who remained "selectively silent" may be impeached by omissions in that statement. **State v. Trice,** 575 S.W.2d 739, 742 (Mo. App. 1979).

The "silence" appellant claims was improperly used by the State in this case was appellant's failure to correct the alleged inaccuracies of his voluntary statement to the police. We find no indication that such "silence" was in any way induced by the implicit assurances of the **Miranda** warnings. Furthermore, appellant is not claiming that his statement to the police was false at the time he gave it. His argument is that his post-**Miranda** statement was inaccurately transcribed by Detective Gibson. The prosecutor's question did not make inquiry regarding appellant's **"silence"** but focused on the accuracy of appellant's **statement.** The State's question was proper impeachment.

Appellant's argument assumes that the right to remain silent is automatically reinstated when a criminal defendant, who waives the right, ceases speaking. While it is true that a defendant may assert his right to remain silent at any point during an interrogation, even following an initial waiver of the right, it does not follow that the right is automatically reasserted at the close of the interrogation. We believe that once the right to remain silent is waived, the waiver continues unless it is affirmatively invoked by a defendant. Absent an affirmative reassertion of the right to remain silent, there is no reliance on the implicit assurances of **Miranda** warnings that silence will carry no penalty.

We find no error in the prosecutor's impeachment of appellant's testimony that the recording of his statement by Detective Gibson was not accurate.

VII.

Appellant next takes issue with the trial court's failure to sustain an objection to the State's closing argument during the punishment phase of trial that if the death penalty were not imposed, appellant would pose a danger to other inmates and corrections personnel.[15] Such an argument, he contends, went beyond the evidence and created such passion and prejudice that he is entitled to a new trial and to have the death sentence set aside.

A.

Under Missouri law, a criminal defendant found guilty of capital murder is entitled to a presentence hearing before the jury which determined his guilt. At the presentence hearing, "the only issue shall be the determination of the punishment to be imposed." § 565.006.2, RSMo (now § 565.030.4, RSMo Cum. Supp. 1984). Appellant argues that the State may not argue a defendant's criminal proclivities at the punishment phase of the trial.

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[15]The prosecutor argued that appellant had already committed a murder while in lawful confinement, that should the death penalty not be imposed, he would be incarcerated for a minimum of fifty years, that he would have "nothing to lose" and that the jury has a duty to protect "the correctional people whose lives could be in danger."

We believe this is a question of first impression. Our cases hold that while the State may argue for a severe penalty as a deterrent to others, it may not argue the necessity of deterring the defendant on trial from committing future crimes. **State v. Raspberry,** 452 S.W.2d 169, 172-73 (Mo. 1970); **State v. Mobley,** 369 S.W.2d 576, 580-81 (Mo. 1963). None of the cases upon which appellant relies, however, involve a death penalty case featuring a bifurcated guilt/punishment hearing.

The focus of the punishment phase of a death penalty case is entirely different from that of the guilt phase. The jury is asked to consider not only the nature and circumstances of the crime but also the character of the defendant. **Gregg v. Georgia,** 428 U.S. 153, 197-98 (1976). Evidence and argument which would not be permitted at the guilt phase -- general references to the defendant's prior criminal record for example -- is both highly relevant and permissible at the punishment phase. The rationale of **Raspberry,** that discussion of a defendant's criminal proclivities prejudicies [sic] a jury which is focusing on the guilt issue, is inapposite when the focus of the inquiry is solely on the punishment which should be imposed.

The death penalty is generally regarded as serving two primary societal purposes: retribution and deterrence of capital crimes by others. **Gregg,** 428 U.S. at 183. The Supreme Court, and this Court have each recognized a third purpose: "the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future." **Gregg,** 428 U.S. at 183, n. 28; **State v. Bolder,** 635 S.W.2d 673, 683 (Mo. banc 1982). **See also State v. Trimble,** 638 S.W.2d 726, 737 (Mo. banc 1982) ("[D]eterring those otherwise undeterred").

One of the aggravating circumstances presented to the jury in this case was that appellant committed murder in a place of lawful confinement. § 565.012.2(9), RSMo Cum. Supp. 1983 (now § 565.032.2(9), RSMo Cum. Supp. 1984). The legislative purpose behind this aggravating circumstance concerns, among other things, the deterrence of the individual criminal defendant who, despite lawful confinement, chooses to kill. When this aggravating circumstance is present, a jury may properly consider whether an incarcerated criminal defendant is likely to place the lives of other prisoners at risk if a sentence other than death is imposed. We find no error in the State's argument.

B.

Appellant argues that the aggravating circumstance of committing a murder while in a place of lawful confinement should be submitted to a jury only when a murder is committed by a person sentenced to prison. Since appellant was not under sentence, but only under arrest, he contends that it was error to submit that aggravating circumstance to the jury.

In **Trimble**, we decided that

> The legitimate state purpose expressed in the statute is not merely to deter capital murder in prisons where imprisonment may not, but to deter them in every case. It is not a condition precedent to the death penalty for capital murder with the aggravating circumstance that the killing was in a prison that the defendant previously had been given a life sentence.

638 S.W.2d at 737. Nor do we believe it is a condition precedent to imposing the death penalty that the person charged with committing murder while in lawful confinement be under any sentence. The statutory condition precedent is lawful confinement. The policy justifications for this aggravating circumstance, "deterring those otherwise undeterred; protecting prison guards who daily serve the state in a dangerous environment; and protecting other prison inmates who are relatively defenseless in the prison environment", **Id.**, are equally strong whether the defendant finds himself in lawful confinement as an incident of arrest or as a result of a sentence. The point is denied.

VIII.

Appellant next argues that the trial court erred in overruling his motion for new trial on the ground that the evidence was insufficient as a matter of law to establish the element of deliberation necessary to a conviction of capital murder.

In reviewing a claim that the evidence is insufficient to support one or more of the elements of a crime, we view the evidence in the light most favorable to the State, accepting as true all evidence and inferences that tend to support the verdict and disregarding all evidence and inferences to the contrary. Our inquiry is limited to whether the evidence, viewed in the light most favorable to the State, is sufficient to support the verdict. **McDonald,** 661 S.W.2d at 500; **Bolder,** 635 S.W.2d at 679.

To sustain a conviction for capital murder, the State must prove that the defendant acted with deliberation.

§ 565.001, RSMo (repealed effective October 1, 1984).[16] Deliberation is present when the act is performed with a cool and deliberate state of mind. **McDonald,** 661 S.W.2d at 501; **State v. LaRette,** 648 S.W.2d 96, 102 (Mo. banc 1983). Direct evidence of deliberation is not necessary to support a capital murder conviction; it is sufficient that deliberation is reasonably inferred from the circumstances surrounding the murder. **LaRette,** 648 S.W.2d at 102; **Bolder,** 635 S.W.2d at 680.

The evidence showed that appellant began his search for George and Winston Jones at the restaurant. When he did not find them, he went immediately to Joy Jones' apartment. Before killing Winston there, appellant announced that he intended to kill the Jones brothers. After killing Winston, appellant went to a drug house at which he expected to find George. When George arrived, appellant forced him at gunpoint into a car, telling him, "I killed your brother and I'm going to kill you." After appellant and George were arrested, appellant managed to step through his handcuffs and attack George, who, as a result of being handcuffed behind his back, was essentially defenseless. Ultimately, appellant killed George in the holding cell by stomping on his head not once, but several times.

The record reveals that appellant had at least four opportunities to abandon his plan to kill George: once after failing to find him at the restaurant; after killing Winston; again after he was arrested by the police; and a fourth time when he was interrupted by officers after battering George into initial semi-consciousness in the holding cell. It is

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[16]Currently, see § 565.020.1, RSMo Cum. Supp. 1984.

difficult to imagine greater commitment to carrying out a design for death than was displayed by appellant. To argue that there was no deliberation in appellant's acts flies in the face of reason and ignores the evidence. The point is without merit and is denied.

IX.

Finally, appellant argues that the penalty of death in this case is excessive and disproportionate to similar cases, considering the crime and the defendant, and that this Court, in the exercise of independent review, should set aside his sentence. § 565.014.3(3), RSMo (repealed October 1, 1984) (now § 565.035.3(3), RSMo Cum. Supp. 1984).

The facts of this case show a level of inhumanity and depravity similar to other cases in which the death penalty was imposed upon a finding by the jury that the murder involved "torture or depravity of mind and that, as a result thereof they were outrageously or wantonly vile or horrible or inhuman." **State v. Guinan,** 665 S.W.2d 325 (Mo. banc 1984); **cert. denied** 105 S.Ct. 227 (1984); **State v. Smith,** 549 S.W.2d 417 (Mo. banc 1983), **cert. denied,** 464 U.S. 908 (1983); **LaRette,** 648 S.W.2d 96; **State v. Blair,** 638 S.W.2d 739 (Mo. banc 1982), **cert. denied,** 459 U.S. 1188 (1983); **State v. Newlon,** 627 S.W.2d 606 (Mo. banc 1982), **cert. denied,** 103 S.Ct. 185 (1982). Appellant chased George Jones at gunpoint and stated to him that "I just killed your brother, and I'm going to kill you too." Later, appellant with his arms free, assaulted George whose hands were cuffed behind his back. Even after battering George into a semi-conscious state, appellant proceeded to jump on his head, inflicting mortal wounds. Appellant's actions were conscienceless and pitiless; they display a depravity of mind

sufficient to support the death penalty. On this basis the death penalty given appellant is not disproportionate.

Moreover, appellant was in a place of lawful confinement at the time of the murder for which he is sentenced to death. **See State v. Roberts,** 709 S.W.2d 857 (Mo. banc 1986); **State v. Shaw,** 636 S.W.2d 667 (Mo. banc 1982), **cert. denied,** 459 U.S. 928 (1982); **Bolder,** 635 S.W.2d 673; **Trimble,** 638 S.W.2d 726; **Guinan,** 665 S.W.2d 325. The killing of another while in confinement is a particularly serious offense; we do not hesitate to affirm the death penalty on firm grounds of social policy and as a deterrent to the killer and others in confinement. **See Shaw,** 636 S.W.2d at 677; **Roberts,** 709 S.W.2d at 870.

Upon consideration of the crime, the defendant and other cases in which the reason penalty has been given, we hold that the death penalty is neither excessive nor disproportionate in this case.

The judgment of the trial court is affirmed.

EDWARD D. ROBERTSON, JR. Judge

Higgins, C.J., Billings, Donnelly and Rendlen, JJ., concur; Blackmar, J., concurs in part and dissents in part in separate opinion filed; Welliver, J., concurs in part and dissents in part and concurs in separate concurring in part and dissenting in part opinion of Blackmar, J.

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. 67720
	)	
CALVERT LEON ANTWINE,	)	
	)	
Appellant.	)	

OPINION CONCURRING IN PART AND DISSENTING IN PART

I concur in the judgment of affirmance of the conviction and in all parts of the principal opinion except VI and VII.

With regard to Part VI, the principal opinion demonstrates that the question about the defendant's silence at the time he was arrested was not objected to, so that review is under the plain error standard. It is logical to assume that, if the defendant had had a purpose of turning himself in, he would have announced this purpose when arrested. Inasmuch as this evidence was received without objection, the State was entitled to refer to it in argument.

I have serious reservations about the broader propositions as to admissibility of post-arrest silence as set out in Part VI of the principal opinion. The principal opinion is convincing on the facts of the particular case, but I see no

occasion for commenting more broadly under these circumstances.

The principal opinion is narrowly drawn in limiting argument about the possibility of the defendant's killing or engaging in violence in the penitentiary, so that it applies only to cases in which killing in custody is assigned as an aggravating circumstance. In spite of this limitation, I believe that the general rule that the defendant's future criminal conduct may not be predicted in oral argument should apply here.[1]

The attempted distinction, on the basis that only the penalty phase of the trial is impacted here, is not sufficient. A jury in a one-phase trial would have no occasion to consider the defendant's future conduct unless it found him guilty.

There should be a limit to the prosecuting attorneys' attempts to inflame the jury. This Court has been unduly tolerant of prosecutors' arguments in other capital murder cases.[2] Prosecutors have responded with continued

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[1]See **State v. Raspberry,** 452 S.W.2d 169, 172-73 (Mo. 1970); **State v. Mobley,** 369 S.W.2d 576, 581 (Mo. 1963); **State v. Tiedt,** 357 Mo. 115, 206 S.W.2d 524, 527-29 (banc 1947); **State v. Heinrich,** 492 S.W.2d 109, 113-16 (Mo. App. 1973).

[2]See, e.g., **State v. Driscoll,** 711 S.W.2d 512 (Mo. banc 1986); **State v. Roberts,** 709 S.W.2d 857 (Mo. banc 1986); **State v. McDonald,** 661 S.W.2d 497 (Mo. banc 1983).

inflammatory broadsides. I believe that there is a time for control.

My conclusion is fortified by two other examples in the present case. The prosecutor argued as follows:

> Why should you and I, as lawful, working citizens of this community, work the rest of our natural lives just so Calvert Antwine can live in the penitentiary for the rest of his natural life or at least until he's served 50 years in prison?

He continued:

> MR. DAKOPOLOS: And isn't it much more humane to sentence this man to death so that his brother can get on with his life, and so that the two children can get on with their lives, instead of having to think, every day for the next 50 years, they have a brother or a father locked up in the penitentiary. Ladies and gentlemen, I submit to you that there is only one verdict you can return as to Count II, and that is a verdict of death.

The first of these arguments is obscene to the point of reminding us of the days of Hitler. It has no place in an American courtroom. The argument about relieving the defendant's family of his presence is little better. No objection was made to either of these arguments, and the second was the subject of effective response, but I believe that they may properly be considered in context.

Because of the prosecutor's arguments I am not willing to affirm the death sentence, and would remand the case for retrial of the penalty phase.

CHARLES B. BLACKMAR, Judge

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. 72218
	)	
CALVERT LEON ANTWINE,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT
OF JACKSON COUNTY
The Honorable Gene R. Martin, Judge

A jury convicted Calvert Antwine of first degree robbery, Section 569.020, RSMo 1978, second degree murder, Section 565.004, RSMo 1978, and capital murder, Section 565.001, RSMo 1978. The jury imposed sentences of thirty years imprisonment, life imprisonment, and death, respectively. This Court affirmed the convictions. ***State v. Antwine***, 743 S.W.2d 51 (Mo. banc 1987), ***cert. denied***, 486 U.S. 1017 (1988). This is an appeal from the trial court's denial of Antwine's motion for post-conviction relief. Rule 29.15. Because this case involves the death penalty, this Court ordered transfer prior to opinion. We have jurisdiction. Mo. Const. art. V., § 10. Affirmed.

I.

The facts of Antwine's crimes are set out in ***State v. Antwine***, 743 S.W.2d 51 (Mo. banc 1987), ***cert. denied***, 486 U.S. 1017 (1988). We need not repeat them here.

Antwine, the movant, timely filed a *pro se* motion for post-conviction relief pursuant to Rule 29.15. The motion court granted movant an additional thirty days to file an amended motion; appointed counsel subsequently filed six amended motions. The last five were filed by leave of court, over State objections that they were not timely filed. At the evidentiary hearing, movant and his trial counsel testified and movant presented several other witnesses, including three police officers, seven of movant's friends and neighbors, a clinical psychologist, two attorneys and a corrections department caseworker. Though noting that the amended motion was not timely filed, the court "consider[ed] gratuitously the merits of all points raised by the defendant in his sixth amended motion." The court issued findings of fact and conclusions of law and overruled the motion.

A.

Rule 29.15(f) requires that any amended motion "be filed within thirty days of the date counsel is appointed or the entry of appearance by counsel that is not appointed." It also allows the court to "extend the time for filing the amended motion for ***one*** additional period not to exceed thirty days." (Emphasis added).

The time limitations of Rule 29.15 are valid and mandatory and place an increased responsibility on the movant, his counsel and the courts to litigate claims

promptly. ***Amrine v. State***, 785 S.W.2d 531, 533 (Mo. banc 1990); ***Sloan v. State***, 779 S.W.2d 580, 581 (Mo. banc 1989), ***cert. denied***, ___ U.S. ___, 110 S.Ct. 1537 (1990); ***Day v. State***, 770 S.W.2d 692, 695 (Mo. banc 1989), ***cert. denied***, ___ U.S. ___, 110 S.Ct. 186 (1989). The trial court was without authority to give additional time beyond that provided by Rule 29.15(f) and additional grounds alleged in the untimely motion were procedurally waived. ***Amrine***, 785 S.W.2d at 533; ***Sloan***, 779 S.W.2d at 582; Rule 29.15(d). On appeal, we shall consider only those allegations raised by Antwine in his timely filed motions.

B.

In a post-conviction motion, the movant has the burden of proving his grounds for relief by a preponderance of the evidence. Rule 29.15(h). This Court's review of a denial of post-conviction relief is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. Rule 29.15(j). The findings and conclusions are deemed clearly erroneous only if a full review of the record leaves the appellate court with the definite and firm impression that a mistake has been made. ***Sidebottom v. State***, 781 S.W.2d 791, 795 (Mo. banc 1989); ***Day***, 770 S.W.2d at 695-96.

We turn now to consider movant's timely filed claims for relief under Rule 29.15.

II.

Movant's first and third points challenge the submission to the jury of certain instructions relating to the jury's consideration of mitigating circumstances on

constitutional grounds. This Court need not consider these points. "[A]n issue which could have been raised on direct appeal, even though it is a constitutional claim, may not be raised in a post-conviction motion, except where fundamental fairness requires otherwise and only in rare and exceptional circumstances." ***Roberts v. State***, 775 S.W.2d 92, 96 (Mo. banc 1989), ***cert. denied*** ___ U.S. ___, 110 S.Ct. 1506 (1990). There are no exceptional circumstances here. The point is denied.

III.

Movant's remaining timely-filed claims focus on the alleged ineffective assistance of his trial counsel. To show that "counsel's assistance was so defective as to require reversal of a conviction or death sentence," movant must show that "counsel's performance was deficient" and "that the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To show prejudice, movant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." ***Id.*** at 690. Movant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" ***Id.*** at 689.

A.

During the penalty phase, counsel called movant's brother and one other person to testify on his behalf. In his closing argument, counsel asked the jury to have mercy on

the movant. He argued two statutory mitigating circumstances, which were submitted to the jury: no significant history of prior criminal activity by the defendant and defendant's age at the time of the crime. Section 565.012.3(1) and (7), RSMo 1978. Instructions to the jury during the penalty phase also allowed jurors to consider any other evidence in mitigation. Movant nevertheless claims that trial counsel was ineffective because he failed to develop other evidence in mitigation of punishment and failed to request the corresponding jury instructions.

Specifically, movant claims that counsel should have introduced evidence and requested instructions for other specific mitigating circumstances, discussion of which follows. Much of the evidence movant claims should have been introduced in the penalty phase had previously been brought to the jury's attention during the guilt phase. However, an attorney, Susan Chapman, who testified as an "expert" witness for movant at the evidentiary hearing, opined that, in light of all the inflammatory evidence the jury had heard, counsel should have emphasized the mitigating evidence in the penalty phase.

Counsel's presentation of the penalty phase of a criminal trial is a matter of professional judgment. Whether that judgment is effective or ineffective is measured by whether the advocacy was reasonable under the circumstances, not by the sentence the defendant receives. ***Clemmons v. State***, 785 S.W.2d 524, 527 (Mo. banc 1990). Counsel has a duty to make a reasonable investigation of possible mitigating evidence or to make a reasonable decision that such an investigation is unnecessary. ***Strickland***, 466 U.S. at 691. However, counsel's "election not to present mitigating evidence is a tactical choice accorded a strong

presumption of correctness ..." ***Walls v. State***, 779 S.W.2d 560, 562 (Mo. banc 1989), ***cert. denied***, ___ U.S. ___ 110 S.Ct. 1538 (1990). Counsel testified that the penalty phase strategy was to present two good witnesses "who projected enough feelings and emotions ... to sway this jury from sentencing him to the death penalty" rather than jeopardizing his credibility with the jury by presenting evidence inconsistent with movant's self-defense theory.

B.

The first three mitigating circumstances sought by movant are statutory, Section 565.012.3, RSMo 1978, and are circumstances relating to the offense charged.

(1)

Movant first claims that counsel should have requested an instruction submitting his victim's participation in the offense as a mitigating circumstance. Section 565.012.3(3), RSMo 1978. Movant testified during the guilt phase that his victim initiated the altercation that led to the victim's death by charging him in the cell and trying to kick him; movant's testimony was thus consistent with his self-defense theory. There was also evidence during the guilt phase that during the original confrontation, before movant and victim were in custody, the victim had a chance to retreat, but chose to continue the altercation. Movant contends that counsel should have requested an instruction submitting the victim's participation in the fatal altercation as a mitigating circumstance.

Movant's contention ignores the jury's complete rejection of his self-defense theory by its guilty verdict. Counsel testified that he chose not to request an instruction

contrary to the jury's previous fact-finding because he wanted to "maintain some credibility with the jury." This was sound trial strategy and not ineffective assistance of counsel.

(2)

Movant also claims that counsel should have requested an instruction that the jury consider whether the offense was committed while movant was under the influence of extreme mental or emotional disturbance. Section 564.012.3(2), RSMo 1978. Movant argues that, although the jury found he did not act in self-defense, there is a reasonable probability that a properly instructed jury could have determined that the events of the day of the crime were so intense and stressful that movant was under the influence of extreme mental or emotional disturbance when he stomped his unconscious victim to death. Counsel again chose not to request such instructions because evidence of mental or emotional disturbance was inconsistent with movant's self-defense theory. This, too, was sound trial strategy and not ineffective assistance of counsel.

(3)

Movant also contends that counsel should have requested an instruction that the jury consider the movant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired during the commitment of the murder. Section 565.012.3(6), RSMo 1978. Counsel testified that he had considered bringing in an expert during the penalty phase to present evidence of diminished capacity, but decided that to switch from self-defense in the guilt phase to diminished capacity in the penalty phase would "los[e] a certain amount

of credibility with the jury." Counsel finally decided to make an emotional appeal instead and did not request an impaired capacity instruction. This was also a matter of trial strategy and not ineffective assistance of counsel.

C.

The next two mitigating circumstances movant claims should have been presented to the jury also relate to the circumstances of the offense but are nonstatutory.

(1)

Movant claims that evidence of the victim's threats to movant and his family should have been presented and consistent instruction based on that evidence should have been requested. Evidence that the victim had threatened movant and his family was presented during the guilt phase. Moreover, counsel testified at the Rule 29.15 hearing that movant did not tell him of any threats prior to the date of the offense and movant did not allege any such threats in his statement to police. Movant's witnesses at the post-conviction hearing could only testify that movant had told them he had been threatened; they bore no firsthand knowledge of those threats. The motion court found no ineffective assistance in counsel's choice not to present evidence of prior threats to movant. This conclusion is not clearly erroneous.

Counsel diligently pursued a defense of self-defense in the guilt phase. The motion court found that counsel "provided a competent defense at trial." The motion court further found that evidence of threats to movant and his family was not sufficient to support an instruction of defense

of others. To support such an instruction, movant would have had to have shown that his family was in imminent danger. ***See State v. Ruffin***, 535 S.W.2d 135, 137 (Mo. App. 1976) ("only a present danger can be a legitimate justification for resort to self-defense"). Given the victim's incarceration, imminent danger to the movant's family could not be shown. The point is denied.

(2)

Movant claims that even though the jury did not accept movant's self-defense claim, counsel should have requested a penalty phase instruction submitting that movant had asked that he not be put in the same police wagon or cell as the victim as a mitigating circumstance. The jury heard that evidence during the guilt phase. Movant's counsel testified at the evidentiary hearing that he felt the jury was sufficiently aware of that evidence and that he did not want to pursue the issue at the penalty phase because the police officer's testimony was that movant "ended up acquiescing in being put in the paddy wagon with the [victim]." Counsel's strategy, which avoided emphasizing the conflict between movant's contentions and police testimony was not unreasonable. The trial court so found; that finding is not clearly erroneous.

D.

The remaining mitigating circumstance instructions sought by movant relate to his character and are also nonstatutory. There, of course, is no absolute duty to present mitigating character evidence at the penalty phase. ***Jones***, 767 S.W.2d 41, 43 (Mo. banc 1989), ***cert. denied***, ___ U.S. ___, 110 S.Ct. 207 (1989).

(1)

Movant contends there was no strategic reason not to submit his employment history as a mitigating circumstance. Prior to the time of the offense, movant had worked more than two and one half years for the same employer. Movant so testified at trial. Counsel testified that he did not present this evidence during the penalty phase because he did not consider it to be a mitigating circumstance. Movant's work record included "employment" as a drug dealer. A decision not to present evidence of a record which was potentially harmful is a reasonable strategic decision. ***Sidebottom***, 781 S.W.2d at 798. The point is denied.

(2)

Movant also contends that during the penalty phase counsel should have presented evidence and requested an instruction that the jury consider that he was a good father. Movant testified about his genuine concern for his two small sons and that he spent more time with them than did their mother. They were well cared-for and well-behaved. Counsel did not request an instruction submitting this as a mitigating circumstance because these facts were before the jury in the guilt phase; counsel had introduced pictures of movant's children during the guilt phase. Counsel was not ineffective; the evidence had been presented and the jurors had been instructed that they could consider all evidence in mitigation.

(3)

Although an instruction specifying lack of "significant history of prior criminal activity" was submitted, movant

contends a stronger instruction should have been requested. Movant had no juvenile record and no history of violent behavior. His only prior record was a suspended imposition of sentence for a conviction of assault with intent to rob without malice; he successfully completed his three years of probation. Movant argues that the prior offense was already in the record and the jury should have been instructed on the mitigating aspects of movant's lack of significant, prior criminal activity. Counsel testified that he did not consider the completed probation a mitigating circumstance. Further, counsel considered whether to bring a prior conviction to the jury's mind, and chose not to do so. Counsel testified he did not consider movant's juvenile record a mitigating circumstance because his adult record was not "clean." All of these were strategic decisions; they do not show ineffective assistance of counsel.

(4)

Movant further claims he served his pretrial detention peacefully and that counsel was ineffective in failing to develop evidence or request an instruction based on movant's peaceful service of his pretrial detention. Evidence existed that would show that movant had been involved in a fight (in addition to the fatal fight) while detained prior to trial. Although movant claimed that someone else started the fight, counsel chose not to provide the State an opportunity in the penalty phase to present evidence of another fight involving the incarcerated movant. One can scarcely argue with a strategic decision to avoid allowing the jury to focus on another fight involving movant while incarcerated; this is particularly so when the jury faced a decision whether to impose the death penalty when an aggravating circumstance

was that the murder occurred while movant was incarcerated. The point is denied.

IV.

Movant next claims that counsel was ineffective because he failed to object to statements made by the prosecutor during the State's penalty phase argument. Movant offered the testimony of an attorney at the evidentiary hearing that there is no tactical reason not to object to improper argument by the state in the penalty phase of a capital case. But failure to object, alone, does not establish ineffective assistance of counsel. ***Stuckey v. State***, 756 S.W.2d 587, 591 (Mo. App. 1988). Movant cites six statements as objectionable.

A.

Three statements may be considered together. First, in describing the potential execution, the prosecutor stated that movant "would be put to death instantaneously." Second, the prosecutor said, "Why should you and I, as lawful working citizens of this community, work the rest of our natural lives just so Calvert Antwine can live in the penitentiary for the rest of his natural life ...?" Third, the state's attorney asked, "[I]sn't it much more humane to sentence this man to death so that his brother [and] two children can get on with their lives ...?"

Counsel testified that he did not object to these statements because he felt that the prosecutor's argument would make the jury angry and "do more damage than good" to the State. The motion court found that the "decision not to object to the arguments ... was a matter of trial strategy."

As we have repeatedly said, reasonable strategic decisions of counsel do not provide a basis for a finding if ineffective assistance of counsel. The point is denied.

B.

Movant next complains that defense counsel should have objected when the prosecutor said of movant, "[I]t is a far more humane execution than this man provided Eric Jones .... This man believes in capital punishment ... in the death penalty ... in execution without a trial by judge and jury ... in execution without a victim being represented by an attorney ... in taking the law into his own hands, not only on the streets but when he's confined." Movant contends that these words show that the prosecutor argued an improper aggravating circumstance, characterizing movant's exercise of his right to trial as an aggravating circumstance. Movant cites ***Griffin v. California***, 380 U.S. 609 (1965) (holding that the prosecutor could not comment on the defendant's exercise of his Fifth Amendment right to remain silent), in support of his contention that the prosecutor's argument invited the jury to punish movant for the exercise of his constitutional rights.

In reviewing the record, we agree with the motion court that the prosecutor's statement does not seek to punish movant for exercising his right to a trial by jury. Instead, the prosecutor's statement, read in context, highlights the nature and seriousness of the crime and movant's disregard for the law. The statement cannot be reasonably read to portray movant's exercise of his right to trial as an aggravating circumstance. The point is denied.

C.

Movant next urges that his counsel was ineffective in failing to object to the prosecutor's assertion that "A jury in Jackson County one day is going to come back with the death penalty in a capital murder case. That day is going to be a day when ... a defendant has proven so clearly to 12 people that he will never be rehabilitated ..." Movant states there was no evidence in the case regarding whether movant would ever be rehabilitated.

It is proper for the jury to consider the character of the defendant in the penalty phase of a death penalty case. ***Antwine***, 743 S.W.2d at 71. A prosecutor may state a conclusion if it is fairly drawn from the evidence; this is true even when it is not the only possible inference. ***Grubbs v. State***, 760 S.W.2d 115, 119 (Mo. banc 1988), *cert. denied*, 109 S.Ct. 2111 (1989). There is evidence that movant coolly and deliberately murdered a second victim while both he and the victim were in custody. The prosecutor could fairly infer that movant could not be rehabilitated and the statement is not objectionable. Defense counsel was not ineffective for failing to object to a statement for which a valid objection could not be offered.

D.

Movant contends that his counsel was ineffective in failing to object when the prosecutor said, "We are asking you to recommend a sentence of death on Count II." Movant contends that this statement violated the rule in ***Caldwell v. Mississippi***, 472 U.S. 320 (1985), holding that the state must not seek to minimize the jury's sense of responsibility for determining the appropriateness of the death penalty. But the

prosecutor made clear, earlier in his argument, that the jury was responsible for sentencing. Given the entirety of the argument, read within context, there is no reasonable likelihood that the jury could have been misled by the word "recommend" into minimizing its role in the process. Counsel was not ineffective in not objecting.

E.

Finally, movant argues that the cumulative affect [sic] of these arguments was to invite the jury to impose the death penalty in an arbitrary and capricious manner, in violation of *Gregg v. Georgia*, 428 U.S. 153 (1976). The argument is boilerplate, offered by the public defender in nearly every post conviction proceeding involving the death penalty. The motion court considered the argument and found "within the context of the entire argument [these statements did] not support defendant's contention that the arguments sought imposition of the death penalty in a[n] arbitrary and capricious manner. Defendant has failed to demonstrate that [these] arguments deprived him of a fair trial." We have reviewed the record and concur with the trial court's findings. The point is denied.

V.

Movant claims, finally, that counsel was ineffective because he failed to arrange for a second mental evaluation of movant. This point goes to both the guilt and punishment phases. According to movant, the first mental evaluation showed movant's behavior was consistent with PCP intoxication, but reasonable investigation by counsel would have revealed that he was not on PCP. That should have alerted counsel that there had been a misdiagnosis and that

a second diagnosis was needed. A second diagnosis, movant argues, would have helped to develop a defense of diminished capacity or mental disease or defect excluding responsibility and would have provided mitigating evidence for the penalty phase.

Movant was examined by Dr. Robijn Hornstra on March 2, 1984, approximately four months after the offense, at the Western Missouri Mental Health Center. Dr. Hornstra found no evidence of mental disease or defect at the time of the offense. Although movant testified at the evidentiary hearing that he had told Dr. Hornstra that he had not taken PCP that day, Dr. Hornstra concluded that movant had most likely taken PCP and valium on the day of the offense and that his behavior was consistent with PCP intoxication.

Dr. William O'Connor, a clinical psychologist, testified at the evidentiary hearing that he reviewed reports of the offense, interviewed movant and gave him a series of tests on September 12, 1988. His opinion is that movant's behavior was inconsistent with PCP intoxication and that movant suffers from a bipolar disorder and was probably in a manic phase at the time of the offense. Dr. O'Connor claimed that his examination is relevant because bipolar disorder is a brain chemistry disorder, tending to develop in early adulthood and to last for a lifetime, not a transient condition. It was most likely, Dr. O'Connor speculated, that movant had the disorder at the time of the offense.

The court "did not find Dr. O'Connor to be a credible witness concerning defendant's mental status at the time of the event." This finding is not clearly erroneous. Dr. O'Connor examined movant nearly five years after the offense. Assuming for the sake of argument that the

diagnosis is correct, it does not establish that movant suffered from a bipolar disorder at the time of the offense, nor does it prove that he was in a manic phase episode at that time. The court did not err in finding that testimony from police officers showed that movant's behavior was "inconsistent with behavior Dr. O'Connor claims would be exhibited during a manic phase episode."

Counsel testified that there was nothing in Dr. Hornstra's report or in counsel's contact with movant that made him feel a second examination was in order. Defense counsel also testified that movant's steadfastly stated goal was to seek and obtain acquittal. Movant had rejected counsel's advice to accept a plea bargain. The steadfast commitment of both counsel and his client to seek acquittal explains the rejection of other options, including the choice to seek a second mental examination, in favor of a self-defense theory.

The motion court found that movant "failed to show the existence of a factual basis indicating that his mental condition was questionable, and therefore his claim of ineffective assistance of counsel must fail." This finding is not clearly erroneous. "[T]he reasonableness of a decision not to investigate depends upon the strategic choices and information provided by the defendant." ***Sanders v. State***, 738 S.W.2d 856, 858 (Mo. banc 1987). Eschewing a defense of diminished capacity in favor of self-defense is such a strategic choice. The point is denied.

VI.

The judgment is affirmed.

EDWARD D. ROBERTSON, JR., Judge

Rendlen, Higgins, Covington, Billings, and Holstein, JJ., concur; Blackmar, C.J., concurs in separate opinion filed.

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. 72218
	)	
CALVERT LEON ANTWINE,	)	
	)	
Appellant.	)	

CONCURRING OPINION

I concur, but would respond on the merits to the points contained in the "untimely" amendments, filed by leave of court and disposed on the merits by the trial court. I am persuaded that none of the points has any merit, and that the trial court correctly disposed of them.

I can understand the desire to have the issues fixed in a reasonable time, but can also understand the trial court's apparent assumption that amendments would be allowed in 29.15 proceedings on the model of amendments in civil actions generally, with the doctrine of relation back.

This opinion and other recent opinions solve the problem for the future, and movants and counsel now know what they must do to avoid procedural default. But the requirements were not so clear when the trial court acted in

this case, and so I would place the affirmance on the merits of all issues submitted to and disposed of by the trial court.

Charles B. Blackmar, Chief Justice

DEFENDANT'S MENTAL STATUS

(#11) Defendant next alleges that he suffered from a mental disease or defect at the time of the offense and that counsel was ineffective in that he failed to seek a mental evaluation of defendant to investigate the defense of diminished capacity pursuant to Section 552.030.3, RSMo 1978, and that such an examination would have shown that the defendant was suffering from a Bi-Polar Disorder, Manic. Motion Point 10(A)(3). Defendant alleges that if counsel had given more frequent and closer attention to defendant, counsel would have filed a notice of intent to rely upon the mental defense. Motion Point 10(A)(17)(a). Defendant alleges that counsel failed to lodge an objection and request for a second and complete mental evaluation of movant when counsel was aware that the mental evaluation performed at Western Missouri Mental Health Center was incomplete and failed to comply with professional standards in the mental health community. Motion Point 10(C)(10). Defendant's [sic] alleges that his jury had no knowledge that he was suffering from an extreme mental or emotional disturbance, or that his ability to appreciate the criminality of his conduct was substantially impaired. Motion Point 10(C)(12)(a)[.] Also, the defendant alleges that he was denied equal protection under the law in that he received a mental evaluation at Western Missouri Mental Health Center that did not meet the minimum standards of forensic examination required in the professional community. Motion Point 13.

Defendant called Dr. William O'Connor, a clinical psychologist to testify in support of this allegation. Dr. O'Connor testified that defendant suffers from a Bi-Polar, Disorder, Manic and suffered from that same disorder at the time of the offense. The Court did not find Dr. O'Connor to

be a credible witness concerning defendant's mental status at the time of the event. The defendant alleges that he received a mental evaluation at Western Missouri Mental Health Center that did not meet the minimum standards of forensic examination. In support of this contention defendant alleges that he received only a twenty-minute examination. Dr. O'Connor testified that he examined defendant for twenty minutes and then gave him a battery of written tests and a Rorsarch [sic] test. Dr. O'Connor spent a day in the company of defendant, but the majority of the time was spent waiting for defendant to fill out a test form. Defendant was examined at Western Missouri Mental Health Center on March 2, 1984 (less than four months after the offense) while Dr. O'Connor examined defendant on September 12, 1988 almost five (5) years after the offense. Dr. O'Connor testified that although blood tests are available to positively determine the existence of a Bi-Polar Disorder, no such tests were performed by him, nor did he request such tests. Dr. O'Connor did not interview any witnesses familiar with defendant, nor did he determine whether or not defendant was under any treatment at the time he examined him. The mental evaluation from Western Missouri Mental Health Center containing the opinion of Dr. Robijn Hornstra, Director of Forensics, was admitted as Movant's Exhibit #7; the Mental Health evaluation containing the findings of Dr. O'Connor was admitted as Movant's Exhibit #12. Dr. O'Connor testified that even if defendant suffers from a Bi-Polar Disorder, he cannot state with certainty that defendant suffered a manic phase episode on the day of the offense. Police Officer Schilling, Detective Gibson, and Detective Lonkausky testified about the defendant's behavior on the day of the offense. Their observations are inconsistent with behavior Dr. O'Connor claims would be exhibited during a manic phase episode. The Court having found no credible

evidence to support the defendant's claim he suffered from a mental disease or defect, or from a diminished mental capacity, accepts Dr. Hornstra's findings. The defendant offered no credible evidence to support his contention that the Western Missouri Mental Health Center's exam was substandard. Additionally, defendant's allegation that counsel was ineffective in not requesting a second mental exam is without merit.

Mr. Brown testified that he did not observe any behavior that led him to believe defendant suffered from any mental disorder, defendant did not advise counsel that he suffered from any mental problems, and defendant was articulate and participated in his defense. In the absence of some suggestions that defendant suffers from some mental instability, there is no duty on counsel to initiate an investigation of the mental condition of the defendant. O'Neal v. State, 724 S.W.2d 302 (Mo. App. 1987). The defendant has failed to show the existence of a factual basis indicating that his mental condition was questionable, and therefore his claim of ineffective assistance of counsel must fail. O'Neal, at 305.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-1890WMKC

Calvert L. Antwine,	*	
	*	
Appellant,	*	
	*	Order Denying Petition for
vs.	*	Rehearing and Suggestion
	*	for Rehearing En Banc
Paul Delo, et al.,	*	
	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. Judge Beam would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

July 25 ,1995

Order Entered at the Direction of the Court:

Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

CLAIM NO. 9

MR. ANTWINE'S RIGHT TO DUE PROCESS AND TO A FAIR TRIAL WAS DENIED AS A RESULT OF PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT IN BOTH GUILT AND PENALTY PHASES OF TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

1. It has long been settled that the prosecutor has a more than purely adversarial role: he or she "is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." United States v. Bagley, 473 U.S. 667, 675 n. 6 (1985) quoting Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). In the closing arguments at both phases of Petitioner's trial, the prosecutors abandoned their primary duty to see "that justice ... be done." Instead, by permitting rhetoric to overwhelm fairness in their closing argument, they invited the jurors to assess Mr. Antwine's guilt on the basis of passion -- not reason. The prosecution's closing arguments included numerous improper statements and entreaties which misled the jury, interfered with its determinations of guilt or innocence and the appropriate punishment based solely on the evidence, and prevented the jury from giving appropriate weight to mitigating evidence. In addition, such arguments interfered with an individualized sentencing determination, undermined the reliability of the jury's determination that death is the appropriate punishment, prejudiced petitioner's exercise of constitutional rights, and rendered the trial fundamentally unfair. Petitioner was thereby deprived of due process, in violation of the Fifth,

Sixth, Eighth and Fourteenth Amendments, as hereafter described.

2. The prosecution must confine its closing argument to admissible evidence on the record and to permissible inferences. See United States v. Dickens, 775 F.2d 1056 (9th Cir. 1985); see also, Model Rule 3.4(e); ABA Standards for Criminal Justice, the Prosecution Function, Rule 3-5.8(a). In this case, the prosecutor violated nearly every rule of adversarial propriety and fairness. It is misconduct for the prosecution to suggest that evidence exists that it has been unable to introduce[2]; to misstate evidence previously given by a witness[3]; and to draw inferences not fairly and reasonably arising from such evidence[4]. The following remarks by the prosecutor during closing argument are examples of misconduct which denied petitioner a fair trial:

a. The State argued that petitioner would commit future criminal conduct if imprisoned when the prosecutor stated, "He was only locked up less than an hour when he killed one man in custody. And we, as society, have a duty to protect people that are

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[2]Hall v. United States, 419 F.2d 582 (5th Cir. 1969).

[3]United States v. Harvey, 756 F.2d 636 (8th Cir. 1985), cert. denied, 474 U.S. 831 (1985); United States v. Singer, 660 F.2d 1295 (8th Cir. 1981), cert. denied, 454 U.S. 1156 (1982).

[4]United States v. Touloumis, 771 F.2d 235 (7th Cir. 1985).

incarcerated." (Tr. 934-935.) There was no evidence that petitioner would engage in future violence and no notice had been given petitioner that the State intended to rely upon future violence as a nonstatutory aggravating circumstance pursuant to Section 565.012.1(3) RSMo (1978). Notice is required by Section 565.006.02 RSMo (1978). The argument is inflammatory and seeks the imposition of the death penalty based upon arbitrary and capricious standards rather than on constitutional and statutory aggravating circumstances, especially since petitioner could have provided substantial evidence of his two year pre-trial incarceration that would have shown he had not been a dangerous person and would pose little risk of future violence.

b. The State argued, "Why should you and I, as lawful, working citizens of this community, work the rest of our natural lives just so Calvert Antwine can live in the penitentiary for the rest of his natural life or at least until he's served fifty years in prison?" (Tr. 933.) This economic argument in support of the penalty of death is outside the evidence. In fact, the State chose to present no evidence during the penalty phase trial. Rather, the State relied "solely upon the evidence which was adduced during the guilt phase of the trial" (Tr. 921.) The argument is outrageous and so incensed Justice Blackmar of the Missouri Supreme Court that he wrote:

> There should be a limit to prosecuting attorneys' attempts to inflame the jury. This Court has been unduly tolerant of prosecutors' arguments in other capital murder cases.

Prosecutors have responded with continued inflammatory broadsides. I believe that there is a time for control.

My conclusion is fortified by two other examples in the present case. The prosecutor argued as follows:

> Why should you and I, as lawful, working citizens of this community, work the rest of our natural lives just so Calvert Antwine can live in the penitentiary for the rest of his natural life or at least until he's served 50 years in prison?

He continued:

> And isn't it much more humane to sentence this man to death so that his brother can get on with his life, and so that the two children can get on with their lives, instead of having to think, every day for the next 50 years, they have a brother or a father locked up in the penitentiary, Ladies and gentlemen, I submit to you that there is only one verdict you can return as to Count II, and that is a verdict of death.

The first of these arguments is obscene to the point of reminding us of the days of Hitler. It has no place in an American courtroom. The argument about relieving the defendant's family of his presence is little better. No objection was made to either of

these arguments, and the second was the subject of effective response, but I believe that they may properly be considered in context.

Because of the prosecutors' arguments I am not willing to affirm the death sentence, and would remand the case for retrial of the penalty phase. Antwine, 743 S.W.2d at 74.

3. No notice had been given by the State of its intent to rely upon the economics of imprisonment as a nonstatutory aggravator pursuant to Section 565.012.1(3). In fact, this concern is not an aggravator, and its presentation supporting the imposition of the death penalty is based upon arbitrary and capricious standards rather than upon constitutional and statutory aggravating circumstances. Additionally, the cost of petitioner's incarceration is not accepted as a legitimate justification for the death penalty. Brooks v. Kemp, 762 F.2d 1383, 1412 (11th Cir. 1985), on remand, 809 F.2d 700 (11th Cir. 1987), cert. denied, 478 U.S. 1022, 106 S.Ct. 3337 (1986), and the argument is misleading, since the jurors, as taxpayers will pay for petitioner's punishment regardless of the sentence imposed.

4. The State argued, "And isn't it much more humane to sentence this man to death so that his brother can get on with his life, and so that the two children can get on with their lives, instead of having to think every day for the next fifty years, they have a brother or a father locked up in the penitentiary" (Tr. 935-936.) This argument seeks to turn mitigating concerns into aggravating circumstances to support the imposition of death, contrary to Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). This argument is callous beyond belief; it smacks more of an

obscene rationalization better suited to a lynch mob than to cloak it with the mantle of the State's respectability in a court of law. The argument was not in support of any aggravating circumstances relied upon by the State and it seeks the imposition of death based upon arbitrary and capricious standards rather than upon constitutional and statutory aggravating circumstances. In seeking to characterize the execution of petitioner as a humane gesture by the State in order to insure the best interests of petitioner's children and brother, the prosecution led the jury to a diminished understanding of its responsibility for determining the appropriate punishment, in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct 2633, 86 L.Ed.2d 231 (1985). Justice Blackmar is correct; this argument has no place in an American courtroom.

5. The State misled the jury by arguing that if petitioner was sentenced to death, "he would be put to death instantaneously" (emphasis added) (Tr. 928-929.) This argument was outside the evidence and seeks to minimize the imposition of the penalty of death, contrary to Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). It was intended to assuage the conscience of the jurors and sought the imposition of the penalty of death based upon arbitrary and capricious concerns rather than upon the constitutional and statutory aggravating circumstances upon which the State relied.

6. The State deliberately misinformed the jury that their imposition of the death penalty would be a recommendation (Tr. 931), contrary to Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); see Section 565.006.2 RSMo (1978) ("The judge shall impose the sentence fixed by the jury...)[.] This

argument seeks to undermine the jury's perception of its responsibility in returning its verdict of death and to remove any vestiges of reticence to return such a verdict as might remain in such a death-qualified jury.

7. The State argued that Winston Jones was killed by "execution." (Tr. 830.) This word was used to inflame the passions of the jury and was not based upon credible evidence. The evidentiary basis was the "opinion" of a general practitioner who admitted that he was not a pathologist (Tr. 462), that forensic pathology was a sideline (Tr. 460), and that he did not conduct the standard tests for a determination that the weapon was fired at close range. (Tr. 472.)

8. The State argued as an aggravating circumstance that petitioner "executed" Eric (George) Jones. (Tr. 929.) Again, this word was used to inflame the passions of the jury and was not based upon any legitimate statutory and constitutional aggravating circumstance or upon unrefutable evidence. It affords no meaningful basis for distinguishing this case (where the State argues the death penalty is justified) from the numerous other capital murder cases where the penalty of death was not sought, contrary to Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). It seeks the imposition of death based upon arbitrary and capricious standards instead of constitutional and statutory aggravating circumstances.

9. Prosecution argument repeatedly focused on Mr. Antwine's exercise of rights secured by the United States Constitution and disparaged his exercise of those rights as having been denied to victims. By ridiculing Petitioner's right to trial, the State mischaracterized petitioner's exercise

of his constitutional right as an aggravating circumstance warranting the imposition of the death penalty: "This man believes in execution without a trial by judge and jury. This man believes in execution without a victim being represented by an attorney." (Tr. 929.) (See also, Tr. 832 and 872). This argument violates Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229,14 L.Ed.2d 106 (1965), in that it denies petitioner his right to a fair trial while apparently advocating lawlessness, i.e. that petitioner does not have a right to a trial and should be dealt with accordingly. This argument is inflammatory and is not based upon any meaningful circumstances which distinguish this capital murder from all others where the penalty of death is not sought. It seeks the imposition of the penalty of death based upon arbitrary and capricious standards rather than upon constitutional and statutory aggravating circumstances.

10. The State argued to limit the jury's consideration of mitigation evidence by suggesting the jury can "only" consider two of the mitigating circumstances submitted to them. (Tr. 932.) This argument interferes with the channelling of the jury's discretion and is inconsistent with the penalty phase Instruction No. 12 telling the jury they "may consider" any circumstances of the death of Eric (George) Jones. This argument violates the rule of Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Skipper v. South Carolina, 476 U.. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), that the sentencer may not refuse to consider or be precluded from considering as a mitigating factor any aspect of the defendant's record or character or any of the circumstances of the offense that the defendant offers as a basis for a sentence less than death. The argument is misleading and improperly limits the jury's consideration of all mitigating circumstances.

11. The State argued that petitioner "has proven to twelve people that he will never be rehabilitated." (Tr. 930.) This argument impermissibly shifts a burden of proof to Petitioner for something not required by law. Petitioner was not obliged to inject the issue of rehabilitation in the trial. There was no evidence presented to support this argument. The argument is inflammatory. It is not based upon any aggravating circumstances upon which the State had given notice it intended to rely, and it seeks the imposition of the penalty of death based upon arbitrary and capricious standards rather than upon constitutional and statutory aggravating circumstances. In addition, the State was allowed to express without qualification or foundation its "expert" opinion contrary to the rules of evidence and due process.

12. The prosecution deliberately ignored basic, hornbook law by attacking in argument petitioner's constitutionally protected silence. (Tr. 832, 872.) Their comments cannot be considered harmless error and relief is required because of this comment alone, Chapman v. California, 386 U.S. 18, 87 S.Ct 824, 17 L.Ed.2d 705 (1967), since the inflammatory arguments in almost every instance followed jury instructions and defense counsel's last opportunity for argument.

13. The sentence of death imposed against petitioner violates his protection against cruel and unusual punishment as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution for the following additional reasons:

a. Petitioner was denied his right to the effective assistance of counsel through the preparation

of and during his jury trial, held August 22, 1985, and August 26-31, 1985. Trial counsel was ineffective in violation of the Sixth and Fourteenth Amendments to the United States Constitution for all the reasons stated herein.

CLAIM NO. 11

MR. ANTWINE WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY FAILED TO CONDUCT AN ADEQUATE INVESTIGATION AND PREPARE AVAILABLE EVIDENCE TO MITIGATE BOTH THE DEGREE AND PUNISHMENT FOR THE OFFENSE.

1. An essential element of due process is the concept of informed consent. This concept permeates many fields of law besides criminal jurisprudence. More broadly stated, due process depends on an informed decision maker making a rational, informed and intelligent choice as a result of a careful and reasonable investigation of all relevant facts and of all reasonable alternatives. In this context neither petitioner nor counsel can be deemed to have made a strategic or tactical decision as to trial tactics (or appellate matters), unassailable from a challenge of ineffective assistance of counsel, if such counsel did not conduct a thorough investigation of the potential witnesses and facts in order to make an informed and intelligent choice.

2. Petitioner was denied effective assistance to trial counsel, counsel on direct appeal and post-conviction counsel because in most circumstances a thorough and reasonable investigation of facts, witnesses and circumstances

was not conducted in order to provide such counsel with the knowledge to make an informed and intelligent decision as to trial (or appellate) tactics and strategy. "Counsel has a duty to make a reasonable investigation of possible mitigating evidence or to make a reasonable decision that such an investigation is unnecessary," Strickland v. Washington, 466 U.S. at 691, but counsel failed to perform even a cursory investigation with which he could have made an informed and intelligent decision as to tactics. The Eighth Circuit Court has held that informed choice is essential in order for a petitioner to have effective assistance of counsel in furtherance of mandated constitutional rights under the Sixth and Fourteenth Amendments. Pickens v. Lockhart, 714 F.2d 1455 (8th Cir. 1983).

3. Courts have repeatedly announced that "an attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). See Pickens v. Lockhart, 714 F.2d 1455 (8th Cir. 1983); See also Chambers v. Armontrout, 885 F.2d 1318 (8th Cir. 1990) (en banc); Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); Rummell v. Estelle, 590 F.2d 103, 104-105 (5th Cir. 1979); Gaines v. Hopper, 575 F.2d 1147, 1148-50 (5th Cir. 1978). See also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982) (at the heart of effective representation is the independent duty to investigate and prepare.)

4. In this case, trial counsel neglected to conduct a reasonable investigation which would have disclosed evidence and witnesses that would contradict the State's case, support an insanity defense or a conviction of a lesser included offense such as second degree murder or

manslaughter, and mitigate against a sentence of death. A reasonable investigation would have disclosed that petitioner suffers from severe mental illness that rises to the level of psychosis, and that also includes a significant probability of organic brain damage that confirms that there is a direct correlation between petitioner's tragic background, mental disabilities and the commission of the offense. Trial counsel's failure to conduct a reasonable investigation that would have exposed these matters resulted in little or no evidence in the record which the jury could consider as critical mitigating circumstances.

5. Counsel's attempt to investigate petitioner's background and obtain the documents necessary to put on an effective mental health defense was limited to reviewing the report prepared by Dr. Hornstra of Western Missouri Mental Health. Counsel's efforts ended there; yet it would have been reasonable for counsel to further pursue the investigation. All that was required to obtain the wealth of information that sheds substantial light on the severity and duration of petitioner's psychotic disorder would have been for counsel to contact his family and neighbors familiar with petitioner throughout his life. Had counsel done so, he would have obtained sufficient information to prepare his own expert if he had retained an independent psychologist/psychiatrist, and plenty of ammunition to cross-examine any expert who would testify in opposition to a psychological defense. Counsel's failure to seek such expert assistance completely vitiated any possible legal claim of diminished capacity or mental disease.

6. Counsel's highest duty is the duty to investigate and prepare. Where counsel unreasonably flouts that duty, the petitioner is denied a fair adversarial testing

process and the proceedings are rendered unreliable. State v. Michael, 530 So.2d 929 (Fla. 1988). See, e.g., Kimmelman v. Morrison, 477 U.S. 365 (1986) (defense counsel failed to request discovery); Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986) (counsel failed to interview potential alibis [sic] witnesses); Thomas v. Kemp, 759 F.2d 1322, 1325 (11th Cir. 1986) (counsel made little effort to obtain mitigating evidence); Aldridge v. Wainwright, 777 F.2d 630 (11th Cir. 1985) (counsel failed to depose any of the State's witnesses); King v. Strickland, 714 F.2d 1481 (11th Cir. 1983) (counsel's failure to present additional character witnesses was not the result of a strategic decision made after reasonable investigation); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978) (counsel presented no defense and failed to investigate evidence of provocation); Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972) (counsel refused to interview alibis [sic] witnesses).

7. Mr. Antwine's trial counsel failed in his duty. Appointed counsel has conducted a reasonable investigation and discovered that there is substantial evidence which was available and which should have been presented to the jury. It is clear that trial and other appellate counsel operated through neglect. This is not a case in which counsel reasonably decided that this was a fruitless avenue of investigation in order to pursue some other, more viable defense. Although not the defense pursued by counsel at trial, counsel had a duty to investigate it before an informed decision could be made. Trial counsel's consideration of diminished capacity or mental capacity was cursory at best. No tactical motive can be ascribed to counsel's oversight. See Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989); Nero v. Blackburn, 587 F.2d 991 (5th Cir. 1979). It is not a reasonable strategy decision to fail to properly investigate

and prepare the defense. See Nealy v. Cabana, 764 F.2d 1173 (5th Cir. 1985). Even if these defenses failed at the guilt phase, such evidence must be introduced and submitted to the trier of fact during the critical penalty phase.

8. A petitioner is entitled to an independent competent mental health evaluation when the State makes his or her mental state relevant to "his criminal culpability and to the punishment he might suffer." Ake v. Oklahoma, 470 U.S. 68, 80, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1984); State v. Sireci, 536 So.2d 231 (Fla. 1988). What is required is an "adequate psychiatric evaluation of his state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). As important as this right is to a petitioner facing the ultimate punishment, the right alone, is useless without "the guiding hand of counsel" to enforce and implement it. See Powell v. Alabama, 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

9. There is a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974). Mental health and mental state issues permeate the law. Their significance is amplified in capital cases where the jury is to give a "reasoned moral response" to the petitioner's "background, character and crime." Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 2952, 100 L.Ed.2d 256 (1989). In a capital case, counsel must conduct a minimally competent independent investigation to discover if his or her client has any mental health problems and to understand the legal impact of such problems on competency, sanity, waivers, specific intent and mitigating circumstances. This careful investigation and assessment must be done before any "strategy" decisions are made. Thompson v. Wainwright, 787 F.2d 1447 (11th Cir.

1986). See Chambers v. Armontrout, 885 F.2d 1318, (8th Cir. 1990) (en banc); Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989). Without adequate investigation, the "strategy" decisions, if any, are tantamount to no strategy at all. Id. See also Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988). See Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989).

10. "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). The Sixth Amendment envisions that every client will be assisted by an attorney "who plays the role necessary to ensure that the trial is fair." Id. at 2063. Performance of counsel's duty requires him to acquire the special knowledge that may be necessary to effectively investigate, prepare and present evidence on issues that require expert assistance. Whether a petitioner was denied the effective assistance of counsel is determined based on the two-prong analysis set forth in Strickland.

11. Under the Strickland test, a petitioner must identify particular acts and/or omissions of counsel that are outside the range of reasonably competent attorney performance under prevailing standards, and demonstrate that a reasonable probability exists that the errors could have had some impact on the proceedings; that is, that confidence in the result of the proceedings is undermined because of counsel's errors. Because of his counsel's errors, Mr. Antwine never received the competent psychiatric/ psychological examination that was necessary for a "just result" and "fair trial." See Futch v. Dugger, 874 F.2d 1483,

1487 (11th Cir. 1989); Evans v. Lewis, supra. Where counsel does not timely and reasonably employ expert assistance in a case in which mental health is or should be at issue, no "tactic" can be ascribed to any decision counsel may make regarding mental health issues.

12. In a capital case, Missouri law makes the petitioner's mental condition relevant to criminal culpability and punishment in many ways: (a) competency at trial and sentencing; (b) legal insanity at the time of the offense; (c) specific intent to commit first degree murder (either premeditation, or the specific intent requirement for underlying felonies in felony murder); (d) statutory mitigating factors; and (e) a myriad of nonstatutory mitigating circumstances. Consequently, Mr. Antwine's counsel should have been aware of the importance of mental health issues and how they may impact on virtually every stage of a capital case.

13. Here, Mr. Antwine was evaluated by Dr. Robin [sic] Hornstra, at Western Missouri Mental Health Center in a cursory examination performed without any mental tests or physical examination. Dr. Hornstra, a middle aged psychiatrist of Scandinavian extraction interviewed Calvert Antwine for approximately twenty to thirty minutes. (Tr. 183.) His clinical history from background material consisted of a Kansas City, Missouri Police Department report which noted prior PCP use. Dr. Hornstra did what professionals are trained not to do: form a hasty opinion based on incomplete and inadequate facts. Dr. Hornstra's personal beliefs and value system are a confluence of his Scandinavian ancestry and his intensive and lengthy medical training. Dr. Hornstra's cultural and educational background is in stark contrast to Calvert Antwine's cloistered world in

the inner-city. Dr. Hornstra relied on police reports without any psychological testing or performing any physical, blood, urine or other physiological examinations. In an abbreviated visit, Dr. Hornstra obviously did not establish a rapport with petitioner from which he could glean any significant knowledge of Calvert Antwine's mental state at the time of the offenses or his emotional and mental development. Trial counsel never received any reliable information on facts relative to petitioner's diminished mental capacity or mental disease from Dr. Hornstra because Dr. Hornstra never obtained any significant date with respect to petitioner's condition.

14. Appointed Counsel has employed Dr. William A. O'Connor, Ph.D., a clinical psychologist, because he performed an initial evaluation of petitioner for purposes of petitioner's Rule 29.15 hearing.

15. Dr. O'Connor's subsequent evaluation included re-testing petitioner with the re-standardized Minnesota Multiphasic Personality Inventory-2 (1989 revision with Special Scoring Scales) referred to hereinafter as the "MMPI" test.

16. The results of the tests conductd [sic] on September 12, 1988 and on July 15-16, 1991, provide a bipolar diagnosis, and are so consistent in spite of the re-formulation of the MMPI test that the probability of obtaining this identity of result by chance between the two MMPI test[s] which were given would be 567 prime, that is, a number obtained by multiplying 567 by 566 and 555 and so on to 1.

17. Dr. William O'Connor concludes that Calvert Antwine is suffering from a mental disease or defect (Bipolar Disorder Manic) which was not appropriately diagnosed at the time of his trial, and that, at the time of the alleged offense, the petitioner clearly demonstrated substantial impairment in the capacity to know and appreciate the nature, quality and wrongfulness of his conduct and substantial impairment in his capacity to conform his conduct to the requirements of the law. Manic episodes clearly preclude a capacity for purposeful, rational, deliberated thought process.

18. Trial counsel provided ineffective assistance of counsel in not adequately investigating and presenting evidence of petitioner's diminished capacity or mental disease. Such failure to present could not have been the result of an informed and intelligent choice, and thus, could not have been a reasonable strategic or tactical decision of counsel. Such failure makes mandatory reversal and retrial of petitioner on all charges because of the extreme prejudice by omission of the diminished capacity or mental disease defense. Such defense would have resulted in an acquittal, findings of guilt on lesser charges or evidence worthy of mitigating the death sentence imposed.

19. The Due Process Clause also protects indigent petitioners against professionally inadequate evaluations by psychiatrists or psychologists. The Fourteenth Amendment mandates that an indigent criminal petitioner be provided with an expert who undertakes his or her task in a professional manner. Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1984). Mr. Antwine claims that, because of counsel's ineffective assistance, the result of the guilt-innocence and sentencing determinations in this case failed to comport with that standard. Mr. Antwine can

present compelling, substantial expert testimony, and lay and documentary evidence in this regard at an evidentiary hearing.

20. Under the relevant case law, in his or her diagnosis, an expert is required to exercise a professionally-recognized "level of care, skill and treatment." The expert is required to adhere to procedures that experts in the field deem necessary to render an accurate diagnosis. Olschefsky v. Fischer, 123 So.2d 751 (Fla.3d DCA 1960). Significant and crucial background facts regarding Mr. Antwine's mental, emotional and psychological background were never sought out, reviewed or considered. A self-report from an organically brain damaged petitioner of limited intelligence formed the primary basis for diagnosis. Counsel and the experts failed to attain the level of mental health assistance which the Constitution mandates. Cf. State v. Mason, 489 So.2d at 737 (noting professional inadequacies of evaluations based "exclusively, or almost exclusively," on clinical interviews with the patient, and explaining the necessity of review of "independent data" because of patients' "inability to convey" information accurately), citing Bonnie, R., and Slobogin, C., The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va.L.Rev. 427, 508-10 (1980). Mason v. State, 489 So.2d at 735-37; Sireci, 502 So.2d at 1224.

21. In the context of diagnosis, exercise of the proper "level of care, skill and treatment" requires adherence to the procedures deemed necessary to render an accurate diagnosis. "[N]ot only must the medical practitioner employ the proper skill and prudence when diagnosing the ailment of a patient, but he or she must also employ methods that are recognized as necessary and customary by similar health care

providers as being acceptable under similar conditions and circumstances." 36 Fla.Jur.2d, Medical Malpractice, § 9 at 147 (1962). See also Olschefsky v. Fischer, 120 So.2d 751 (Fla.3d DCA 1960). In the context of a forensic mental health evaluation in a criminal case, the inquiry focuses upon the acceptable methods of diagnosis of a person presenting symptoms such as those exhibited by the petitioner and consideration of the petitioner's mental health history. Where, as here, an adequate client history is not obtained, it can neither be adequately considered nor used to evaluate the causes of the client's symptoms and ailments. Counsel has a duty to aid the expert and to assure that necessary information is received.

22. It is generally agreed that the proper method of assessment must include the following steps: First, an accurate medical and social history must be obtained and must be obtained from sources independent of the patient. See Bonnie, R., and Slobogin, C., 66 Va.L.Rev. 427, 508-10 (1980). Obtaining such a history from relevant records and family members would not have been difficult. Because "[i]t is often only from the details in the history" that psychological or psychiatric deficits can be detected and properly assessed, see e.g., R. Strub and F. Black, Organic Brain Syndromes, 42 (1981), the history could reasonably be considered the single most valuable element to help the clinician reach an accurate diagnosis.

23. It is well recognized that the patient is often an unreliable data source for his own medical and social history. See Mason, supra. "The past personal history is somewhat distorted by the patient's memory of events and by [other] knowledge ... ," Kaplan and Sadock, supra at 488. Accordingly, "retrospective falsification, in which the patient

changes the reporting of past events or is selective in what is able to be remembered, is a constant hazard of which the [expert] must be aware." Id. Because of the phenomenon:

> [T]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie and Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427 (1980) (emphasis added), cited with approval in Mason v. State, supra. Accord, Kaplan and Sadock, supra at 550; American Psychiatric Association, "Report of the Task Force on the Rose [sic] of Psychiatry in the Sentencing Process," Issues in Forensic Psychiatry, p. 202 (1984); Pollack, Psychiatric Consultation for the Court, 1 Bull. Am. Acad. Psych. & L. 267, 274 (1974); H. Davidson, Forensic Psychiatry, pp. 38-39 (2d ed. 1965); MacDonald, supra at 98.

24. In Mr. Antwine's case, neuropsychological testing was also absolutely critical, given the organic brain

damage, limited intelligence and pattern of behavior. Psychology and psychiatry have long recognized that a professionally adequate evaluation requires consideration of the effects of mental retardation, mental illness and organic brain damage on the patient's behavior. See R. Slovenko, Psychiatry and the Law at 400 (1973). See also S. Arieti, American Handbook of Psychiatry at 1161 (2d ed. 1974); J. MacDonald, Psychiatry and the Criminal at 102-03 (1958). Accord H. Kaplan and B. Sadock, Comprehensive Textbook of Psychiatry at 548, 964, 1866-68 (4th ed. 1985); R. Hoffman, Diagnostic Errors in the Evaluation of Behavioral Disorders, 248 J. A. Med. Ass'n. 964 (1982). Because such deficiencies can be readily but mistakenly diagnosed as personality disorder, the mental health profession has recognized that, before a diagnosis of personality disorder can be made, the evaluating psychologist or psychiatrist must first rule out those bases for the symptoms presented. See, e.g., Kaplan and Sadock, supra, at 964.

25. Moreover, appropriate diagnostic studies must be undertaken in light of the patient's history. The profession recognizes that thorough psychological testing is indispensable to an adequate evaluation. Proper testing and proper interpretation of testing and of the patient's mental state at the time of the evaluation, as well as at all periods of time relevant to the evaluation, should be conducted. Thereafter, the results of proper testing must be considered and reviewed along with the information concerning the patient's mental health background and history and the information obtained during the examination. In short, proper use of testing instruments and proper assessment of psychological testing is critical to a professionally adequate evaluation. See Kaplan and Sadock, pp. 547-48. A valid interpretation of testing in the context of an evaluation of the

patient's history is an integral part of the standard of care attendant to an adequate evaluation. The standard of care mandates that the psychologist's interpretation of what testing is conducted by "recognized as acceptable and appropriate by reasonably prudent similar health care providers" [i.e., in the field of psychology]. See Fla. Stat. § 768.45(1).

26. The results of appropriate testing instruments, such as the Wechsler Adult Intelligence Scale (WAIS, or currently WAIS-R) (describes "the criterion of adult intelligence, and no other instrument even comes close," Gregory, Adult Intellectual Assessment, p. 59), cannot be ignored and must be considered along with the patient's history. Intelligence tests measure "the capacity of an individual to understand the world about him and his resourcefulness to cope with its challenges," Wechsler, Intelligence Defined and Undefined (1975), p. 139; American Psychologist 30, pp. 135-139.

27. Petitioner was prejudiced by counsel's oversight in his duty to his client because adequate preparation by counsel would have enabled him to assert an effective psychological defense and produce powerful mitigation of punishment. As explained in Tyler v. Kemp, supra:

> In Lockett v. Ohio, the court held that a defendant has a right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving accurate information regarding the defendant. Without that information, a jury cannot make the

> life/death decision in a rational and individualized manner. Here the jury was given no information to aid them in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to assure confidence in that decision.

Id. at 743 (citations omitted).

28. The prejudice suffered by petitioner is similar to that found in Deutscher, where the Ninth Circuit held:

> Although we do not presume prejudice in a case such as this, we must be especially cautious in protecting a defendant's right to effective counsel at a capital sentencing hearing. The constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy. California v. Brown, 479 U.S. 538 (1987). Considerations of such evidence is "constitutionally indispensable part of the process of inflicting the penalty of death."

Id. (quoting Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality). The Supreme Court has consistently held that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (quoting Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)). See also Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). Deutscher v. Whitley, 884 F.2d at 1161. This resulted in accord with Strickland v.

Washington, 466 U.S. 668, 695, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984):

> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

In this case, the failure to investigate and present the wealth of material available about Mr. Antwine, his background and his disability was highly prejudicial. Petitioner is entitled to a full and fair evidentiary hearing on the allegations herein, Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986), and, thereafter, the issuance of the writ of habeas corpus.

29. Petitioner was denied his rights to effective assistance of appellate counsel and to due process of law, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as set forth in Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 893 L.Ed.2d 821 (1985), in that the constitutional claims resulting from ineffective assistance

of trial counsel were not presented on direct appeal, nor was an independent investigation completed to determine claims which should have been raised at trial or on direct appeal and the claims contained in petitioner's petition herein which are incorporated by reference were not raised on appeal prejudicing petitioner's constitutional rights.

30. Petitioner was denied his rights to effective assistance of appellate counsel and to due process of law, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as set forth in Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 893 L.Ed.2d 821 (1985) when counsel on his direct appeal failed to challenge the giving of penalty phase Instruction No. 12. Instruction No. 12 told the jury that they must unanimously find the existence of a mitigating circumstance before that circumstance could be utilized in the weighing process, and thereby precluded the jury's consideration of mitigating circumstances, in violation of Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988).

31. Petitioner was denied his rights to effective assistance of appellate counsel and to due process of law, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and by Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L.Ed.2d 821 (1985), when counsel on petitioner's direct appeal failed to challenge the trial court giving Instruction No. 10, submitting the aggravating circumstance of whether the offense was "outrageously or wantonly vile, horrible or inhuman, in that it involved torture, or depravity of mind," in violation of petitioner's rights to due process of law, a fair trial, and to be free from cruel and unusual punishment, as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution,

since the aggravating circumstance is vague and provides no guidance, contrary to Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); and Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); affirming, 822 F.2d 1477 (10th Cir. 1987).

32. Petitioner further asserts that he was denied his rights to effective assistance of counsel and to due process of law, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and by Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), when counsel on direct appeal failed to challenge the exclusion of Cayton's testimony, as stated in previous paragraphs in the petition, on grounds that exclusion of such testimony violated his rights to due process of law and to be free from cruel and unusual punishment, and was contrary to Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979).

Supreme Court, U.S.
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No. 95-659

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MICHAEL BOWERSOX,

Petitioner,

v.

CALVERT LEON ANTWINE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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19 pp

QUESTIONS PRESENTED

I.

CERTIORARI SHOULD BE DENIED BECAUSE THE EIGHTH CIRCUIT CORRECTLY DECIDED THAT RESPONDENT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF HIS CAPITAL TRIAL.

II.

CERTIORARI SHOULD BE DENIED BECAUSE THE EIGHTH CIRCUIT CORRECTLY FOUND THAT THE PROSECUTOR'S PENALTY PHASE CLOSING ARGUMENT WAS INACCURATE AND DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY IN VIOLATION OF RESPONDENT'S EIGHTH AMENDMENT RIGHTS.

III.

CERTIORARI SHOULD BE DENIED BECAUSE THE EIGHTH CIRCUIT PROPERLY FOUND THAT THE PROSECUTOR'S PENALTY PHASE ARGUMENTS VIOLATED RESPONDENT'S DUE PROCESS RIGHTS.

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No. 95-659

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MICHAEL BOWERSOX,

Petitioner,

v.

CALVERT LEON ANTWINE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Calvert Leon Antwine, by and through counsel, submits to the Court the following brief in opposition to petitioner's petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

I.

INTRODUCTION AND STATEMENT OF THE CASE

Respondent Calvert Leon Antwine was convicted and sentenced to death by a Missouri State Court for the 1983 murder of Eric "George" Jones, a Jamaican drug dealer, which occurred in a holding cell of the Kansas City, Missouri Police Department headquarters. By all accounts, Respondent's trial counsel, and even the trial prosecutors, did not believe that Respondent would be sentenced to death due to the facts and circumstances surrounding the case. Their views were understandable because there was a great deal of

evidence adduced at trial that Respondent acted with considerable justification in killing the victim. This evidence included prior threats and acts of violence perpetrated against Respondent and his family by the victim. Unfortunately for Respondent, his trial counsel's confidence that his case did not present an appropriate case for the death penalty proved to be inaccurate.

The paramount issue before this Court on the present petition for writ of certiorari is the constitutionality of the penalty phase of Respondent's trial. The record is uncontroverted that Respondent's trial counsel conducted absolutely no investigation or preparation for the penalty phase of the trial. During the penalty phase, the only evidence presented by trial counsel in mitigation of punishment was a brief plea for mercy from Respondent's brother. Trial counsel inexplicably failed to request a second mental evaluation to which Respondent was entitled under state law and the United States Constitution. Post-trial mental examinations produced evidence that Respondent suffers from a bipolar disorder, a life-time condition which would have provided powerful mitigating evidence if presented to the jury at trial.

The penalty phase proceedings in Respondent's trial were also tainted by numerous outrageous and flagrantly improper prosecution arguments. The prosecutor, among other things, argued that death by lethal gas would be instantaneous, that putting Respondent to death would save Missouri taxpayers' money and that putting Respondent to death would be more humane and merciful for his family than a sentence of life imprisonment. These arguments so

offended former Missouri Supreme Court Chief Justice Charles Blackmar that he noted in his dissent during Respondent's direct appeal that these remarks were "obscene to the point of reminding us of the days of Hitler." State v. Antwine, 743 S.W.2d 51, 74 (Mo. banc 1987)(Blackmar, J., dissenting).

After a thorough review of the record in this case, a three judge panel of the Eighth Circuit Court of Appeals unanimously concluded that the penalty phase proceedings in Respondent's case were constitutionally infirm, and therefore ordered a new penalty phase trial. The Eighth Circuit's panel opinion granted habeas relief on three separate grounds. The court found trial counsel was ineffective in failing to investigate and present mitigating evidence regarding Respondent's mental condition. The Court further found that both Respondent's Eighth and Fourteenth Amendment rights were violated by the improper penalty phase closing arguments given by the prosecution. Petitioner's application for rehearing *en banc* was denied over only one dissent. Because the Eighth Circuit panel opinion was based upon the application of well established and sound constitutional principles to the peculiar facts presented in this case, Respondent respectfully requests that certiorari be denied.

ARGUMENT

I.

CERTIORARI SHOULD BE DENIED BECAUSE THE EIGHTH CIRCUIT CORRECTLY DECIDED THAT RESPONDENT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF HIS CAPITAL TRIAL.

The first question presented by petitioner in support of his request that this Court exercise its discretionary review of this case involves the Eighth Circuit's conclusion that Respondent received ineffective assistance of counsel at the penalty phase of his trial. Petitioner misleadingly frames this question in an attempt to portray the Eighth Circuit's opinion on this issue as ignoring statutory presumption of correctness provisions applicable to habeas corpus actions embodied in 28 U.S.C. § 2254(d). Nothing could be further from the truth. To the contrary, the Eighth Circuit's resolution of this ineffective assistance of counsel claim does not implicate any significant or unsettled issue regarding the interpretation of 28 U.S.C. § 2254(d). Instead, the Eighth Circuit opinion merely involves the application of well established legal principles to the particular facts presented in Respondent's case. As result, as will be demonstrated in the following discussion, certiorari should be denied on this point.

Petitioner's assertion that this case presents an important issue of federalism in that the Eighth Circuit consciously disregarded the statutory presumption of correctness is incorrect and obscures the real issue addressed by the Eighth Circuit in deciding this claim. A plain reading of the Eighth Circuit opinion reveals that the critical issue in considering this claim was

whether Respondent could establish prejudice under Strickland v. Washington, 466 U.S. 668, 694 (1984). Applying the familiar Strickland test, the Eighth Circuit panel unanimously concluded in a detailed and reasoned manner that trial counsel's failure to investigate and present evidence of Respondent's mental disease necessitated a new penalty phase trial. (A - 15-23). In this regard, it is important to note that the court found that Respondent was sufficiently prejudiced in the penalty phase to receive a new sentencing hearing, but not sufficiently prejudiced to receive a new trial as to his guilt. (A - 22-23).

On the basis of the record, there can be no serious dispute that trial counsel was ineffective under the performance prong of Strickland. As the panel noted, the initial mental examination, which consisted of only a brief 20-minute interview, concluded that Respondent's odd behavior was the result of PCP intoxication. (A - 15-16). However, the record indicates that Respondent told his trial attorney that he was not using PCP at the time of the offense. Therefore, the Eighth Circuit found trial counsel's performance ineffective in not requesting a second and more thorough mental evaluation to which Respondent was entitled to under both Missouri law and the United States Constitution. (A - 16). See § 552 RSMo. (1986).

The essential question presented to the Eighth Circuit by this case was Strickland prejudice and is totally ignored in petitioner's certiorari petition. The Eighth Circuit panel appropriately framed this issue in the case as follows:

> The issue is whether the failure to discover and present evidence of Antwine's mental condition undermines our confidence in the outcome of either the guilt or sentencing phase of the trial. We are concerned, then, with whether the jury -- not the motion court -- would have found the evidence of Antwine's mental condition credible.

(A - 16). The Eighth Circuit further stated in this regard:

> The question we must ask is whether a jury would have credited Dr. O'Connor's diagnosis if it had been presented to them at the trial, and whether the failure to present the evidence undermines our confidence in the proceeding.

(A - 18).

As these above-quoted passages illustrate, the strength and credibility of the evidence of Respondent's mental illness was part and parcel of the Eighth Circuit's Strickland prejudice analysis. It is well settled that the issue of Strickland prejudice presents a mixed question of law and fact to which the presumption of correctness provisions of 28 U.S.C. § 2254(d) do not apply. Strickland v. Washington, 466 U.S. 668, 698 (1984); Kimmelman v. Morrison, 477 U.S. 365, 378-380 (1986); Townsend v. Sain, 372 U.S. 293, 309, n. 6 (1963). Such "mixed questions" of law and fact are subject to plenary review by federal appellate courts. See Bose Corp. v. Consumer's Union of U.S., Inc., 466 U.S. 485, 501 (1984). As result, the Eighth Circuit properly reviewed the issue of Strickland prejudice *de novo*, and concluded that Respondent was sufficiently prejudiced at the penalty phase to be entitled to habeas relief. (A - 23). This conclusion was based upon a

thorough and painstaking review of the record in the case and should not be disturbed.

The Eighth Circuit properly reviewed Respondent's ineffective assistance of counsel claims *de novo*[1] and reached the correct conclusion under the peculiar facts presented in this case. Petitioner's federalism argument is a "red herring" masking his disagreement with the conclusions of the Court on the question of Strickland prejudice. As result, the petition for writ of certiorari should be denied.

II.

CERTIORARI SHOULD BE DENIED BECAUSE THE EIGHTH CIRCUIT CORRECTLY FOUND THAT THE PROSECUTOR'S PENALTY PHASE CLOSING ARGUMENT WAS INACCURATE AND DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY IN VIOLATION OF RESPONDENT'S EIGHTH AMENDMENT RIGHTS.

The second question presented by the petitioner involves his view that the Eighth Circuit panel misapplied the law in finding that the prosecutor's penalty phase closing argument, in which he argued that death by lethal gas would be instantaneous, violated the Eighth and Fourteenth Amendments under the holding of Caldwell v. Mississippi, 472 U.S. 320 (1985). Petitioner's primary argument is that the panel opinion purportedly conflicts with subsequent cases reviewing Caldwell-type claims, most notably Romano v. Oklahoma, 114 S. Ct. 2004 (1994).

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[1]Even if some deference is to be accorded to some of the state court findings, respondent believes that the Eighth Circuit panel demonstrated that any such findings were not supported by the record as a whole under 28 U.S.C. § 2254(d)(8).

Contrary to petitioner's assertion, a full and fair reading of Romano actually supports the Eighth Circuit's decision that the prosecutor's remarks regarding the instantaneous death that would result from lethal gas violated the Eighth and Fourteenth Amendments. This Court's opinion in Romano apparently adopts the reasoning in Justice O'Connor's concurring opinion in Caldwell[2] which stated that an Eighth Amendment violation occurs only if:

> The prosecutor's remarks . . . were inaccurate and misleading in a manner that diminished the jury's sense of responsibility.

Caldwell, 472 U.S. at 342 (O'Connor, J., concurring).

Petitioner does not dispute the fact that the argument at issue in this case was inaccurate, misleading and totally specious. The critical question which the Eighth Circuit specifically addressed was whether this argument unconstitutionally diminished the jury's sense of responsibility for its sentencing decision. After a careful and reasoned analysis, the Eighth Circuit panel concluded that a sentencing decision based upon such an argument could not meet the heightened standards of reliability that the Eighth Amendment requires. (A - 5-8).

In Romano, this Court held that the jury was not affirmatively misled by the introduction of the petitioner's prior death sentence

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[2]"When no single rationale commands a majority, 'the holding of the court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds.'" City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 764, n. 9 (1988). Therefore, Justice O'Connor's concurring opinions in both Caldwell and Romano should be viewed as the holdings in those cases.

because that evidence was not false at the time it was admitted. As Justice O'Connor pointed out:

> The inaccuracy of the prosecutor's argument in Caldwell was essential to my conclusion that the argument was unconstitutional. [Romano]'s Caldwell claim fails because the evidence here was accurate at the time it was admitted. . . . Though evidence like that involved in this case can rise to the level of a Caldwell violation, to do so the evidence must be both inaccurate and tend to undermine the jury's sense of responsibility.

Romano, 114 S. Ct. at 2013, (O'Connor, J., concurring).

In sum, Caldwell and its progeny requires only two factors to be shown to establish an Eighth Amendment violation. First, it must be shown that the challenged argument or evidence was either inaccurate or misleading. Second, it must be shown that the challenged evidence or argument diminished the jury's sense of responsibility for imposing the death sentence. Both of these factors, as the Eighth Circuit panel demonstrated, are present in this case.

The flaw in petitioner's argument is that he reads a third requirement -- that the evidence or argument must also misdescribe the jury's role in the sentencing process -- to be necessary for a death sentenced inmate to prevail on a Caldwell claim. This third requirement advanced by petitioner is illogical and in conflict with Caldwell and Romano. The argument at issue in Caldwell did not technically misdescribe the jury's role because the jury's sentencing decision was in fact subject to appellate review.[3]

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[3]The challenged evidence in Romano also had nothing to do with describing the jury's role in the capital sentencing process.

The underlying evil addressed in Caldwell is the unmistakable fact that, when false evidence or an improper argument is presented, the sentencer is much more likely to impose death in a close case in violation of the fundamental Eighth Amendment principle that requires heightened reliability in capital sentencing proceedings. As a matter of logic and common sense, as the Eighth Circuit panel pointed out, the problem with the argument in this case is the plain and simple fact that the jurors were more likely to impose a death sentence, when they otherwise would not have, based solely on the improper, inaccurate, and irrelevant consideration that death by lethal gas would be instantaneous and painless. (A - 7).

To adopt petitioner's flawed reading of Caldwell would contradict almost two decades of this Court's Eighth Amendment jurisprudence. The core value of the Eighth Amendment's application to capital sentencing schemes is the requirement that the sentencer receive "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." Gregg v. Georgia, 428 U.S. 153, 190 (1976). In adhering to this principle, this Court has invalidated death sentences that have been tainted either by the consideration of inaccurate or false information or procedural rules that have tended to diminish the reliability of the sentencing determination in death penalty cases. Beck v. Alabama,

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Nevertheless, Justice O'Connor recognized that this evidence would have risen to the level of a Caldwell violation if it had been inaccurate. 114 S. Ct. at 2013 (O'Connor, J., concurring).

447 U.S. 625, 638 (1980); Johnson v. Mississippi, 486 U.S. 578 (1988).

The Eighth Circuit panel's opinion finding that the improper argument violated established Eighth Amendment principles does not conflict with, but instead reaffirms, fundamental values embodied in almost two decades of death penalty jurisprudence from this Court. As result, the petition for writ of certiorari should be denied.

III.

CERTIORARI SHOULD BE DENIED BECAUSE THE EIGHTH CIRCUIT PROPERLY FOUND THAT THE PROSECUTOR'S PENALTY PHASE ARGUMENTS VIOLATED RESPONDENT'S DUE PROCESS RIGHTS.

The final question petitioner presents for this Court's discretionary review is the panel's conclusion that the prosecutor's penalty phase arguments violated Respondent's due process rights. Petitioner contends that panel opinion applied a diluted standard of review to the prosecutor's closing arguments in the penalty phase of this trial. Petitioner apparently suggests that this Court grant review to clarify the appropriate standard of review in such situations.

It is absolutely unnecessary for this Court to grant certiorari on this question because the Eighth Circuit standard of review applied to Respondent's case, which is derived from Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989), cert. denied, 497 U.S. 1038 (1990), is entirely and completely consistent with the due process standard of review that has been applied in numerous opinions from this Court. Nowhere in his argument does petitioner

contend that the Eighth Circuit standard derived from Newlon is inconsistent with any opinion from this Court. Instead, petitioner relies on fiery rhetoric from a solitary member of the Missouri Supreme Court who apparently resents the fact that state court decisions in death penalty cases are subject to independent federal review. (See Cert. pet. at 23).

Stripped to its essentials, petitioner's argument merely expresses disagreement with the application of well-settled due process principles to the peculiar facts presented in the closing arguments in Respondent's case. This disagreement does not provide a sufficient ground to justify this Court's exercise of its discretionary review.

Almost every death penalty case that comes before the federal courts for review includes a constitutional challenge to the prosecutor's penalty phase closing argument. These attacks are almost always unsuccessful. See e.g., Sloan v. Delo, 54 F.3d 1371, 1389, n. 19 (8th Cir. 1995); Blair v. Armontrout, 916 F.2d 1310, 1324 (8th Cir. 1990). Only in Newlon, and now in Respondent's case, has the Eighth Circuit found a prosecutor's penalty phase closing argument sufficiently egregious and so prejudicial as to entitle a condemned prisoner to a new penalty phase trial.

The Eighth Circuit panel in this case carefully and thoroughly applied the proper legal standard to the facts of Respondent's case. (A - 8-15). It concluded that Respondent's case contained a number of improper arguments which, although less numerous and less thematic than those in Newlon, nevertheless entitled

Respondent to penalty phase relief under due process standards. (A - 11-14). The panel considered the cumulative impact of the improper arguments and concluded that there was a reasonable probability that, but for these improper remarks, Respondent would not have been sentenced to death. In reaching this conclusion, the panel properly considered the totality of the circumstances of this case, including the strength of the evidence supporting the death penalty.[4] (A - 13-14).

A point apparently lost in petitioner's argument is that he concedes that the prosecutor's arguments were flagrantly improper. If a condemned prisoner cannot receive any penalty phase relief from arguments that were deemed so offensive by an eminent and respected Missouri jurist that they had "no place in an American courtroom"[5] it would be difficult to imagine that any death sentenced inmate could ever be entitled to habeas relief no matter how outrageous or inflammatory the argument presented at trial.[6]

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[4]There is no inconsistency between the analysis employed by the Eighth Circuit and the series of four Eleventh Circuit cases cited by petitioner. (See Cert. pet. at 24). Of those four cases, the Eleventh Circuit denied relief in Brooks and both Tucker cases because the evidence was overwhelming. However, in Drake, that court reversed the death sentence because, like Antwine's case, the evidence supporting the death sentence was much weaker.

[5]State v. Antwine, 743 S.W.2d 51, 74 (Mo. banc 1987) (Blackmar, J., dissenting).

[6]To strongly condemn an argument, yet do nothing about it, is, to paraphrase the words of Judge Jerome Frank, an abrogation of judicial duty. Overzealous prosecutors "are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking." United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2nd Cir. 1946)(Frank, J., dissenting).

The due process standard applied to challenges to penalty phase arguments is appropriately flexible and gives reviewing courts the ability to apply a totality of the circumstances test to the case at bar. In Respondent's case, the evidence supporting the death penalty was far from overwhelming. The Eighth Circuit panel, without dissent, concluded that Respondent was entitled to habeas relief. This well-reasoned decision should not be disturbed by this Court merely because the petitioner disagrees with the outcome.

CONCLUSION

For all the foregoing reasons, Respondent Calvert Leon Antwine respectfully requests that the writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am CJA-appointed counsel for Respondent and that three true and correct copies of "Brief in Opposition to Petition for Writ of Certiorari" and "Respondent's Motion for Leave to Proceed *In Forma Pauperis*" in the case of Michael Bowersox v. Calvert Leon Antwine, No. 95-569, were mailed pursuant to Supreme Court Rule 29.5(b), postage prepaid, this 22nd day of November, 1995, to:

Steven D. Hawke, Assistant Attorney General
Post Office Box 899
Jefferson City, Missouri, 65102.

Twelve copies of the above-referenced Brief and Motion were mailed to William Suter, Clerk, United States Supreme Court, pursuant to Supreme Court Rule 39.5, this 22nd day of November, 1995.

Jay D. DeHardt